[redacted]

CERTIFIED RECORD OF TRIAL

(and accompanying papers)

of

Kelley	Erick	R.	[redacted]	ET2
(Last Name)	*(First Name)*	*MI*	*(DoD ID No.)*	*(Rank)*

[redacted]	U.S. Coast Guard	Alameda, CA
(Unit/Command Name)	*(Branch of Service)*	*(Location)*

By

General Court-Martial (GCM) — COURT-MARTIAL

(GCM, SPCM, or SCM)

Convened by Commander

(Title of Convening Authority)

U.S. Coast Guard Pacific Area

(Unit/Command of Convening Authority)

Tried at

Alameda, CA	On	15-21 May 2023
(Place or Places of Trial)		*(Date or Dates of Trial)*

Companion and other cases: NONE

(Rank, Name, DOD ID No., (if applicable), or enter "None")

[redacted]

CONVENING ORDER

GENERAL COURT-MARTIAL	)	COMMANDER
	)	
	)	COAST GUARD PACIFIC AREA
	)	ALAMEDA, CALIFORNIA
AMENDMENT NO. 5	)	
CONVENING ORDER	)	
NO. 1-21	)	Date: APR 07 2021
	)	

COMMANDER
COAST GUARD PACIFIC AREA

1. The General Court-Martial convened by order no. 1-21, dated 11 March 2021, is hereby amended, in the case of *United States v. ET2 Erick R. Kelley, USCG*, only.

2. All members previously detailed to the General Court-Martial convened by order no. 1-21, dated 11 March 2021, are hereby relieved.

3. In the case of *United States v. ET2 Erick R. Kelley, USCG*, the following members are hereby detailed as members of the General Court-Martial convened by order no. 1-21:

[redacted] CAPT
[redacted] CDR
[redacted] CDR
[redacted] CDR
[redacted] LCDR
[redacted] LT
[redacted] LT
[redacted] LTJG
[redacted] ENS
[redacted] ELC3
[redacted] DIV4
[redacted] PERS3
[redacted] BMCM
[redacted] MKCS

[redacted] ASTC
[redacted] SKC
[redacted] ETC
[redacted] ISC
[redacted] BM1
[redacted] AMT1
[redacted] ET1
[redacted] EM1
[redacted] YN1
[redacted] YN1
[redacted] ET1
[redacted] IS1
[redacted] ME2

4. I authorize the military judge to impanel one (1) alternate member if excess members are available after identification of the primary panel members.

[redacted]

A. J. Tiongson
Vice Admiral, U.S. Coast Guard
Commander
Coast Guard Pacific Area

CHARGE SHEET

CHARGE SHEET

I. PERSONAL DATA

1. NAME OF ACCUSED (Last, First, MI)	2. EMPLID	3. RANK/RATE	4. PAY GRADE
KELLEY, Erick, R	[redacted]	ET2	E-5

5. UNIT OR ORGANIZATION	6. CURRENT SERVICE	
[redacted]	a. INITIAL DATE	b. TERM
	16Jan2020	6 yrs

7. PAY PER MONTH			8. NATURE OF RESTRAINT OF ACCUSED	9. DATE(S) IMPOSED
a. BASIC	b. SEA/FOREIGN DUTY	c. TOTAL		
[redacted] 3,874.80 ~~$3,704.00~~		3,874.80 [redacted]	None.	N/A

II. CHARGES AND SPECIFICATIONS

10. CHARGE: VIOLATION OF THE UCMJ, ARTICLE 134

SPECIFICATION 1 (Possession of Child Pornography): In that Electronics Technician Second Class Erick R. Kelley, [redacted] did, on active duty, at or near Kodiak, Alaska, on or about May 18, 2020 knowingly and wrongfully possess child pornography, to wit: eight digital images of a minor, engaging in sexually explicit conduct, and that said conduct was of a nature to bring discredit upon the armed forces.

SPECIFICATION 2 (Distribution of Child Pornography): In that Electronics Technician Second Class Erick R. Kelley, [redacted] did, on active duty, at or near Kodiak, Alaska, on or about May 18, 2020, knowingly and wrongfully distribute child pornography, to wit: two digital videos of a minor engaging in sexually explicit conduct, and that said conduct was of a nature to bring discredit upon the armed forces.

III. PREFERRAL

11a. NAME OF ACCUSER (Last, First, MI)	b. GRADE	c. ORGANIZATION OF ACCUSER
[redacted]	O-3	Legal Service Command

d. SIGNATURE OF ACCUSER	e. DATE (YYYYMMDD)
[redacted]	20220330

AFFIDAVIT: Before me, the undersigned, authorized by law to administer oaths in cases of this character, personally appeared the above named accuser this 30th day of March 2022, and signed the foregoing charges and specifications under oath that he/she is a person subject to the Uniform Code of Military Justice and that he/she either has personal knowledge of or has investigated the matters set forth therein and that the same are true to the best of his/her knowledge and belief.

[redacted]	Legal Service Command
Typed Name of Officer	*Organization of Officer*
O-4	Commissioned Officer
Grade	*Official Capacity to Administer Oaths (See R.C.M. 307(b)--must be commissioned officer)*

[redacted]

12.

On March 31, 2022, the accused was informed of the charges against him/her and of the name(s) of the accuser(s) known to me *(See R.C.M. 308(a)). (See R.C.M. 308 if notification cannot be made.)*

[redacted]
Typed Name of Immediate Commander

U.S.C.G. Base Kodiak
Organization of Immediate Commander

Capt
Grade

[redacted]

IV. RECEIPT BY SUMMARY COURT-MARTIAL CONVENING AUTHORITY

13.

The sworn charges were received at 1200 hours, 14 April, 2022 at United States Coast Guard
Designation of Command or

Pacific Area
Officer Exercising Summary Court-Martial Jurisdiction (See R.C.M. 403)

FOR THE [1] XXXXXXXXXXXXXXXXXXXXXX

VADM M. F. MCALLISTER
Typed Name of Officer

COMMANDER
Official Capacity of Officer Signing

O-9
Grade

[redacted]

V. REFERRAL; SERVICE OF CHARGES

14a. DESIGNATION OF COMMAND OF CONVENING AUTHORITY	b. PLACE	c. DATE *(YYYYMMDD)*
U.S. Coast Guard Pacific Area	Alameda, CA	20220527

Referred for trial to the General court-martial convened by Coast Guard Pacific Area

General Court-Martial Convening Order No. 1-21,

dated March 11, 2021, subject to the following instructions: [2]

By _____ of _____
Command or Order

VADM M.F. MCALLISTER
Typed Name of Officer

Commander, USCG Pacific Area
Official Capacity of Officer Signing

O-9
Grade

[redacted]

15.

On 6 June, 2022, I (caused to be) served a copy hereof on (each of) the above named accused.

Tracey L. Kiernan
Typed Name of Trial Counsel

O-3, Lieutenant
Grade or Rank of Trial Counsel

[redacted]

FOOTNOTES: 1 - When an appropriate commander signs personally, inapplicable words are stricken.
2 - See R.C.M. 601(e) concerning instructions. If none, so state.

Reset

TRIAL COURT MOTIONS & RESPONSES

COAST GUARD TRIAL JUDICIARY
WESTERN JUDICIAL CIRCUIT
GENERAL COURT-MARTIAL

UNITED STATES v. ERICK R. KELLEY Electronics Technician Second Class U.S. COAST GUARD	GOVERNMENT RESPONSE TO DEFENSE POST-TRIAL MOTION FOR APPROPRIATE RELIEF 14 July 2023

RELIEF SOUGHT

The United States, through Trial Counsel (hereinafter the Government), respectfully requests this Court deny the Defense's motion for appropriate relief to set aside finding of Guilty related to Charge I, Specification 1 and deny Defense's request for a New Trial.

SUMMARY

The question from the members indicated that they reached a general verdict and were confused on how proceed in completing the special findings worksheet. The military judge took the appropriate action by reinstructing the members on the proper procedure, which alleviated any confusion the members had, demonstrated by the verdict announced by the president and confirmed on the findings worksheet without additional questions or reconsideration.

The members' question submitted states, "[w]e've voted on both specs. But we don't have ¾ majority on any individual files. We weren't clear on how to come to a consensus on each file (page 3) or if that's required." Defense's argument is that the military judge "failed to accept the finding of the members." However, the members did not announce findings through the question that requested clarification on voting instructions and the military judge was within his authority to restate instructions and it was required; and Defense waived any later relief when they did not object to the judge's proposed rereading of the specified instructions. In fact, Defense agreed with the military judge's proposed reading of the specific instructions. The question provided by the members was clearly seeking clarification regarding instructions on voting and was not an announcement of the findings, nor was it intended to be an announcement of findings. The question did not state how the members voted on either specification, further the question indicated that the members had not voted on any specific images and even asked whether that was required.

If the members had moved forward with findings of guilty on either specification without identifying any images, it would have been an ambiguous "general" verdict and the military judge would have been required to provide further instructions to the members prior to the announcement under RCM 921(d). CAAF has stated that the trial court "compound[s] [error]

when the military judge fail[s] to secure clarification" of an ambiguous verdict. *United States v. Walters*, 58 MJ 391, 396 (C.A.A.F. 2003).

Further, Defense argues that the finding of Guilty should be set aside, consistent with Defense's R.C.M 917 motion during trial, because the evidence is legally insufficient that the Accused knowingly possessed the images because they both existed in cache memory. However, the military judge already ruled on the Defense's original motion that the evidence was legally sufficient to sustain a conviction, which was before the Accused testified. This is significant because the Accused's testimony was in direct conflict with both the forensic evidence but also the Government expert's opinion. Further, per R.C.M. 918(g) the findings need not be set aside upon review solely because the motion for findings of not guilty should have been granted upon the state of the evidence when it was made, if all the evidence admitted before findings is sufficient to sustain findings of guilty.

Defense has requested, in the alternative, a new trial. A new trial should only be granted if there has been a "manifest injustice would result absent a new trial, rehearing, or reopening based on proffered newly discovered evidence." *United States v. William,* 37 M.J. at 356. The facts and circumstances surrounding the issues raised by defense do not raise any concern surrounding legal insufficiency or error, so definitely do not equate to a manifested injustice.

Therefore, the United States respectfully requests that this Court deny the Defense's motion on all grounds.

FACTS

1. ET2 Erick Kelley (hereinafter: the "Accused") was charged with two specifications of Article 134, (Possession of Child Pornography and Distribution of Child Pornography). Trial commenced on 15 May 2023. The members found the Accused guilty and the Military Judge sentenced the Accused on 21 May 2023.

2. At trial Investigator [redacted] from Alaska State Troopers (TCU) testified that on 18 May 2020, he made a direct connection with the Internet Protocol (IP) address [redacted] which was offering files of child sexual exploitation. Using the Undercover Investigative Software (UIS), and permission from the targeted IP address, Investigator [redacted] was able to download the files and any logs associated with the IP address directly into the UIS computer. He testified that at 0436 on 18 May he was able to download 1 digital file that contained both images and video and the video was titled '[redacted]' At 0441 Investigator [redacted] made another connection with IP address [redacted] and was able to download a digital file that contained a video. The video was titled "[redacted]" Investigator [redacted] testified that, following a search authorization, he confirmed that the subscriber assigned to IP address [redacted] was assigned to [redacted] wife of ET2 Erick Kelley, and located at [redacted] which is part of United States Coast Guard Housing.

3. On 19 May 2023, the Government concluded its case via the testimony of its digital forensic expert (DFE) witness. He testified for – hours and the members asked – questions, the most of any witness who testified on either side. While multiple witnesses discussed "cache," the Government DEF provided the most comprehensive explanation of the significance of cache and what it means if a file or image is found in the cache of different applications on the accused's cell phone. (See Enclosure 1).

4. On 19 May 2023, the Government rested. Defense counsel made a motion for a finding of not guilty for all specifications under R.C.M. 917. The military judge denied the motion.

5. During Defense's case the accused testified that he had never seen any of the images in evidence that were used to support the specifications.

6. Over the course of trial, panel members asked over 30 questions during the case on the merits. This included the following members questions to the Accused (See audio minutes 13:10): The members asked the accused questions: AE 94-AE 97. The below questions from the members (See Enclosure 2):

7. On 21 May 2023, after closing arguments, the military judge provided the following pertinent instructions:

[redacted]

8. The military judge confirmed with the panel president whether he understood and was following the instructions. The panel president confirmed he understood the instructions. The military judge then explained page three of the findings worksheet, if the members found the accused guilty of any specification, and that the members must choose which images or videos, but did not instruct how voting or that selection would be conducted. The military judge then explained that if there were questions during deliberations, he would open the court. (See Enclosure 3).

9. After providing these instructions, a panel member asked for the military judge to restate instructions on voting and whether they vote on the elements of the charge. The military judge restated that the members would vote on specifications first and then on the charge. (See Enclosure 3).

10. Deliberations began at 1246.

11. At about 1758 on 21 May 2023, the members provided a question to the bailiff, which has been labeled as AE 107. During an Article 39(a) session, the military judge read aloud the question to counsel:

[redacted]

AE 107.

12. Following the reading of the members' question, Defense's interpreted the question as informing the parties that the majority of members could not convict the accused in

regards to the possession charge and believed that it mandated a finding, by the military judge, of not guilty for Specification 1.

13. In response, Trial Counsel stated that the question should be interpreted as a general verdict. Defense Counsel concurred, stating that if the images were not specified it would be a general verdict. (See Enclosure 4).

14. The Court recessed and then came back on the record for another Article 39(a) session. The Military Judge summarized the parties' positions. Trial Counsel then stated that, after further review of the members' question, it was apparent that the members' were clearly seeking clarification on instructions, and recommended that the military judge reinstruct the members. (See Enclosure 4).

15. The Defense disagreed and argued the members revealed, through the question, that they had reached findings for the possession offense and that they found the Accused not guilty because they could not come to an agreement on any piece of evidence. The Defense requested the military judge direct a finding of not guilty. (See Enclosure 4).

16. The Military Judge states the members had already voted on the specifications, but had not identified the images. The military judge proposed restating portions of the instructions that he had already provided prior to deliberations, which included how voting would result in guilty or not guilty findings. Specifically, he proposed stating,

17. The only difference between the supplemental instructions provided following the members' question and the initial procedural instructions was the language "...you must also have at least six votes of guilty regarding any specific image or video" that was during the supplemental instructions.

18. The military judge asked the bailiff to call the court members back in and provided the following additional instructions:

19. The judge included an explanation of exceptions and substitutions and provided a brief instruction on a reconsideration. These were the same instructions provided prior to deliberations, except the bold portion was added.

20. The military judge ensured the procedural instructions addressed the question and reemphasized to the members that "what goes on in the members' room stays in the members' room." Also, the judge stated any additional questions must be written down and provided to the Court. (See Enclosure 4).

21. At 1926, about 30 minutes later, the members' indicated they had a verdict. The court was called in session and the panel provided the findings worksheet to the military judge for review. The Panel President announced the findings, findings the accused guilty of Charge I, Specification 1, possession of child pornography; and not guilty of Charge I, Specification 2, distribution of child pornography.

22. After the court was closed, defense counsel and Trial counsel reviewed the findings worksheet together and the panel had identified two images that supported Charge I, specification 1; images identified as the [redacted].PDF and Image 720d.

23. The [redacted].PDF file was found in the cache of the Hanscom Office Suite application on the Android cell phone. The file contained images at the top of the document that contained several pre-pubescent girls under the age of 10 and a list of 35-37 titles or file names under the images and onto a second page.

24. Image 720d was found in the internet browser cache on the Android cell phone and depicted a young girl wearing black lingerie, white knee high stockings, exposing her genitalia. This is the same young girl in the [redacted] videos that was received by

the Alaska State Troopers from the accused's IP address in May 2020 and the same young girl identified in other images in evidence that were found on the Kelley's phone is his browser cache.

BURDEN

As the moving party, Defense has the burden of proof. The Defense has failed to provide any evidence or supporting case law that an announcement of the findings was made or that the military judge has authority to set aside findings. In addition, the standard for legal sufficiency under R.C.M. 1104 is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. See *United States v. Wright*, 42 M.J. 163, 166 (C.A.A.F.1995) (citing *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979)).

LAW & ARGUMENT

The Defense is requesting relief that this Court cannot give. RCM 1104 is clear in what relief can be provided and why. The purpose of post-trial Article 39(a) sessions is to inquire into, and, when appropriate, resolve any matter that arises after trial that substantially affects the legal sufficiency of any findings of guilty. R.C.M. 1104(a)(2). Defense cites *United States v. Webb*, 66 M.J. 89 (C.A.A.F 2008), which is not applicable in this case. The facts in *United States v. Webb* were related to impeachment material concerning a major government witness that was not disclosed. The Court cannot "set aside" a finding of guilty in this case for the issue of a possible announcement of findings. The Rules for Courts-Martial provide extensive guidance on findings, instructions, and the role and responsibilities of the military judge and counsel to avoid ambiguous findings and how to clarify for the members.

A. MEMBERS QUESTION AE 107 IS AMBIGUOUS, DOES NOT CONSTITUTE AN ANNOUNCEMENT OF FINDINGS, AND THEREFORE THE COURT'S ACTIONS WERE LAWFUL AND CORRECT

The defense argues the question received from the members, AE 107, about the findings worksheet constituted an announcement of findings and due to the question, itself should have resulted in a finding of not guilty. Defense's argument is wrong in multiple ways. First, Defense fails to provide evidence, that the facts and circumstances surrounding the members' question support an announcement of findings. Second, Defense fails to provide support that the military judge would have had authority to direct the members to make a finding of not guilty. Last, Defense fails to demonstrate that the actions taken by the military judge were in unlawful or an error. The question on its face is ambiguous.

1. Members Question AE 107 does not constitute an announcement of findings under R.C.M. 921

"A finding on the guilty or innocence of the accused is not final until it is formally and correctly announced in open court." *United States v. London*, 4 U.S.C.M.A 90, 96, 15 C.M.R. 90, 96 (1954). "The announcement of a verdict is sufficient if it decides the questions in issue in such a

way as to enable the court intelligently to base judgment thereon and can form the basis for a bar to subsequent prosecution for the same offense." *United States v. Perkins*, 56 M.J. 825, 827 (A.Ct.Crim.App.2001). Findings "shall be announced in the presence of all parties promptly after they have been determined" and only the president can announce findings, in a court-martial by members. R.C.M. 922(b). Under R.C.M. 922(d), if an error was made in the announcement of the findings of the court-martial, the error may be correct ed by a new announcement in accordance with this rule. An error must be discovered and the new announcement made before the final adjournment of the court-martial in the case. R.C.M. 922(d)

Here, the evidence clearly demonstrates that there was no final finding reached because the members question at issue was neither a formal nor correct announcement. The members submitted a written question to the Court regarding instructions that the military judge read aloud to the parties, without members present. Not even the Defense in their motion is arguing that the president had formally stated the verdict. Moreover, during the Article 39(a) after receiving the question, the parties and Military Judge considered the question while the members were still in their closed deliberations. There was no formal or correct announcement in open court.

The members question in AE 107 is not a "sufficient" verdict because it was a question seeking clarification. The question is prefaced with an indication by the members that a vote on the specifications has been completed, but there was no explicit statement of the actual verdict. Specifically, the question was concerning instructions and voting on the individual files listed on page three of the findings worksheet. Page three of the findings worksheet contained the list of images and videos for both specifications. The question was seeking clarification and the military judge had the duty and authority to provide such clarification. Even after members have reached findings, the military judge may, in the presence of the parties, examine any writing which the president intends to read to announce the findings and may assist the members in putting the findings in proper form. R.C.M. 921(d). Furthermore, the Rules for Courts-Martial states that "neither that writing nor *any oral or written clarification or discussion concerning it shall constitute announcement of the findings.*" RCM 921(d). (emphasis added). Here, the military judge was not even reviewing the findings worksheet, but only a question from the members.

When determining whether findings have been announced prior to the presentation of the findings worksheet or the president announcing in open court, C.A.A.F. examines the intent behind the earlier communication. See *United States v. McAllister*, 42 C.M.R. 22, 24 (C.M.A. 1970). In *McAllister,* the panel president disclosed, when the court reopened after a period of closed session deliberations on the findings, that a vote had been taken, but an abstention by one member had resulted in an insufficient number of votes being cast for a finding of not guilty. The Court held that this did not constitute an announcement of findings of not guilty as "[t]he remarks at the reopening of the court clearly indicate that the members did not regard the vote as a final vote, and reconvened in open session only to obtain instructions on further balloting." *Id.* at 24. In another case, *United States v. Nash*, 5 U.S.C.M.A. 550, 552, 554, 18 C.M.R. 174 (1995), the trial court reconvened after an initial vote on the findings to obtain clarification of the procedure for reballoting. The Court did not find the president's disclosure of the vote as announcement of a finding of not guilty.

In greater review of court members intent, the Court in *United States v. Perez,* 40 M.J. 373 (C.M.A. 1994), addressed whether the president's disclosure that the court members had unanimously found the overt act not proved was an announcement of a finding of not guilty.[1] The court ultimately held it was not. In *Perez,* the court also relied upon R.C.M. 921(d), stating "[t]he record clearly reflects that the president's disclosure of the vote occurred during the discussion of the proposed findings as reflected on the findings worksheet and the marked up copy of the charges and specifications" which is the type of discussion referenced in RCM 921. *Id* at 376. The court emphasized that the announcement of findings contemplated by RCM 922 is "the formal announcement after any discussions or clarifications of the finding have been completed." *Id* at 376, citing *United States v. London*, 4 USCMA 90, 97, 15 CMR 90, 97 (1954) ("The only findings that can have legal effect are those formally and correctly announced in open court."). The facts in *Perez* are even more detailed concerning the intent of the members, as the members stated that they did not find all elements had been proven beyond a reasonable doubt, yet the findings worksheet indicated that the members initially voted to convict the accused, but had excepted the language describing the alleged overt act.

Here, again, and considering this precedent, what is clear from AE 107 is that members did not intend to make an official announcement on the findings when they submitted AE 107 to the Court. Rather, the members requested further instructions on how to proceed to reach that final verdict. Furthermore, given the question from the members, the supplemental instructions provided by the military judge were clearly within the parameters and intentions of R.C.M. 921(d) regarding discussions and clarifications. The military judge's prudent decision to provide supplemental instruction resulted in a proper verdict, formally and correctly announced in open court, and evidenced by a completed findings worksheet.

2. <u>The Defense's argument that AE 107 is announcement of findings would result in an ambiguous finding which requires this Court to do exactly what it did on 21 May 2023 – provide clarifying instructions.</u>

Under R.C.M. 920, instructions on findings, the military judge shall give the members appropriate instructions on findings. There is no allegation that the members were improperly instructed. And in fact, the Defense and Government were very involved and careful in drafting instructions. Both parties and the Court even drafted a findings worksheet that all agreed on before it was given to members to ensure specificity and to avoid a general verdict. Furthermore, when the judge solicited input for the supplemental instructions, he was going to provide to the members defense counsel explicitly did not object to the proposed instructions. It is important to note that, "[a]bsent evidence to the contrary, court members are presumed to comply with the military judge's instructions." *United States v. McFadden*, 74 M.J. 87, 90 (C.A.A.F. 2015) (quoting United States v. Hornback, 73 M.J. 155, 161 (C.A.A.F. 2014)).

[1] After the case was submitted on its merits to the court members, the members indicated that they had reached a verdict. When the military judge asked to examine the findings worksheet before the findings were announced, the president informed him that the members had unanimously agreed to except the words from the specification alleging that appellant "in order to effect the object of the conspiracy ... turned off the surveillance cameras in the base exchange." The president explained that the court members were unanimous in believing that the overt act had not been proved beyond a reasonable doubt. The findings worksheet and the marked up copy of the charges and specifications indicated that the members initially voted to convict appellant of conspiracy, but had excepted the language describing the alleged overt act." *United States v. Perez* at 375.

Assuming, *arguendo*, the Defense's argument that AE 107 did amount to an announcement of findings, the Rules for Courts-Martial and supporting case law support the Court's actions in this case. The Rules for Courts-Martial and case law make it clear that it is part of the military judge's responsibility, when reviewing the findings worksheet, that the findings are not ambiguous. Ambiguous findings make a review of legal and factual sufficiency legally impossible under Article 66 and would preclude the Coast Guard Court of Criminal Appeals from performing a factual sufficiency analysis. *See United States v. Walters,* 58 M.J. 391 (C.A.A.F. 2003). Therefore, regardless of how this Court ultimately characterizes AE 107 (as a question or a findings announcement), the fact that AE 107 includes **a question posed by the members required that the military judge obtain and provide clarification.** It would have been error for this Court to do otherwise. Indeed, there is substantial caselaw on verdicts being set aside because the military trial judge did *not* provide additional instructions or seek clarification of findings worksheets prior to the formal and correct announcement of findings.

It is the Court's duty to avoid defective findings because it protects the accused against double prosecution. The military judge has a responsibility to clarify instructions, and this can occur even when reviewing the findings worksheet. *See United States v. Walters,* 58 M.J. 391 (C.A.A.F. 2003). See also *United States v. Augspurger*, 61 M.J. 189, 193 (C.A.A.F. 2005)("Our superior court has made it clear that it is the responsibility of the military judge to ensure that any ambiguities or deficiencies in a court-martial's findings "are clarified before the findings are announced."). The risk of ambiguous findings is high especially when charges include "on divers occasions" and members are able to make findings by "exceptions and substitutions." *United States v. Augspurger*, 61 M.J. 189 (the military judge should properly instruct the members that if they except the "divers occasion" language from a specification, they need to make clear which allegation was the basis for their guilty finding).

In *United States v. Walters*, C.A.A.F. held that the military judge erred in giving incomplete instructions regarding the use of findings by exceptions and substitutions and in failing to secure clarification of the court-martial's ambiguous findings prior to announcement. [2] *United States v. Walters*, 58 MJ 391 (where a specification alleges wrongful acts on "divers occasions," the members must be instructed that any findings by exceptions and substitutions that remove the "divers occasions" language must clearly reflect the specific instance of conduct upon which their modified findings are based; that can generally be accomplished through reference in the substituted language to a relevant date or other facts in evidence that will clearly put the accused and the reviewing courts on notice of what conduct served as the basis for the findings).

When the members in *Walters* returned from deliberations, the president indicated that they wanted to make sure they had filled out the worksheet correctly. *Id* at 393. The military judge then provided instruction on how to mark the worksheet. The issue on the worksheet was not knowing which incident the accused was found guilty, and the military judge's instructions did not address the requirement that "any findings by exceptions and substitutions that remove the 'divers occasions' language must clearly reflect the specific instance of conduct upon which their modified findings are based." *Id* at 396. Further in *Walters*, CAAF stated that the error was

[2] The wrongful use specification alleged use "on divers occasions between on or about [date]." The Government offered proof at trial of a number of instances of alleged use of ecstasy during the time period in the specification. The military judge gave the pre-argument instructions, which included a "variance" instruction. Then, after argument, gave the members the findings worksheet and gave them instructions regarding its use. *United States v. Walters*, 58 M.J. 391 (C.A.A.F. 2003)

"compounded when the military failed to secure clarification of the ambiguity when reviewed the findings worksheet prior to announcement under RCM 921(d)."

There has been plenty of case law that has resulted in C.A.A.F. setting aside verdicts because the military judge did not take the appropriate actions, which then resulted in the appellate courts unable to review. In *United States v. Wilson*, 67 M.J. 423 (C.A.A.F. 2009), a military judge alone court-martial, the military judge did not specify the single occasion as part of the finding. Citing *Walters* clarification of ambiguous findings "can generally be accomplished through reference in the substituted language to a relevant date or other facts in evidence that will clearly put the accused and the reviewing courts on notice of what conduct served as the basis for the findings." Without such clarification, the findings of the present case are fatally ambiguous. *Wilson* at 428. In *United States v. Seider*, 60 M.J. 36 (C.A.A.F.2004), the court held that when an accused is charged with "committing "illegal conduct 'on divers occasions' and the [court-martial] find [s] the accused guilty of charged conduct but strikes out the 'on divers occasions' language, the effect of the findings is that the accused has been found guilty of misconduct on a single occasion and not guilty of the remaining occasions." *Id.* When this occurs, if "the findings do not disclose the single occasion on which the conviction is based, the Court of Criminal Appeals cannot conduct a factual sufficiency review or affirm the findings because it cannot determine which occasion the servicemember was convicted of and which occasion the servicemember was acquitted of." *Id.* citing *United States v. Augspurger*, 61 M.J. 189, 190 (C.A.A.F.2005); see *United States v. Walters*, 58 M.J. 391 (C.A.A.F.2003). Also in *United States v. Scheurer*, 62 MJ 100, 112 (CAAF 2005) a military judge ultimately found accused guilty of "excepting the words on diver occasions" and found accused guilty of a single use of drugs over the course of a year, however, the appellate court was unable to discern which use was the single incident that formed the basis on the finding.

A more recent, unreported case, that addresses clarification of instructions sought by members mid-deliberation is *United States v. Reyes-Lesmes*, 2020 WL 6533831, (ACCA 2020). The Army Court of Criminal Appeals held that the military judge did not direct the members to reconsider their findings and was not required to provide reconsideration instruction to the panel members, but rather instructed the panel to correct an improperly completed findings worksheet. The military judge in *Reyes-Lesmes* provided initial instructions on the specifications and findings worksheet[3], but then the military judge had to provide clarification to members. The members announced they had reached a verdict and it was not until the military judge was reviewing the findings worksheet that the judge noted clarification was needed and that the members still needed to circle what was "applicable" and reminded the panel president of her instruction on Charge II. The panel president quested further clarification, specifically how to determine which specification they select. Specifically, the question was "How do we determine which spec we select and does it matter? We did not make a collective decision on which spec to select." *Id.* at 3. The military judge provided supplemental instructions by re-reading portions of the instructions she previously provided. In addition, the military judge explained that a finding of guilty as to any of the three specifications required six votes, further the military judge stated:

[3] "When instructing the members on voting procedures and using the findings worksheet as an aid in recording the findings, she instructed the members, "[a]s for Charge II, you see there you have three choices, so start with a vote, Specification 1, guilty or not, or Specification 2, and then Specification 3." She further instructed the members that if they found appellant guilty of any specification, then they must also find him guilty of the corresponding charge. Finally, the military judge instructed the panel president to cross out anything on the findings worksheet that did not apply." *United States v. Reyes-Lesmes* at 2 (ACCA 2020).

The military judge in *Reyes-Lesmes* did not confer with counsel prior to reinstructing the members, nor did she disclose the written question to the parties prior to reinstructing members. It was not until the military judge sent the members back to the deliberation room did the judge discuss her reasoning for the clarification and the contents of the members' question. The military judge concluded that the members had voted on the charge but had not voted on the specification. The trial judge reinstructed what voting requirements were needed for a guilty verdict or not guilty.

Here, this Court, and the parties at the Court's prompting, were always concerned with an ambiguous verdict. Indeed, before trial started, the Court sought to avoid an ambiguous verdict by instructing the parties to work on a special findings worksheet. The parties and Court came to an agreement on the worksheet. That worksheet was ultimately submitted to the members. However AE 107 is characterized, it is undisputedly a question about how to complete that worksheet. Here, similar to the facts in *Reyes-Lesmes*, the Defense did not object to the military judge's course of action to reinstruct the members, nor did the Defense object to the substance of the supplemental instructions, or request instructions on reconsideration. As C.A.A.F recently emphasized, waiver is the " 'intentional relinquishment or abandonment of a known right.' " *United States v. Davis*, 79 M.J. 329, 331 (C.A.A.F. 2020) (quoting *United States v. Gladue*, 67 M.J. 311, 313 (C.A.A.F. 2009)). Prior to reading the supplemental instructions to the members, this Court asked Defense counsel for his input on what the Court proposed to read. Defense Counsel did not object. Accordingly, the Defense has waived their right to object to the supplemental clarifying instructions provided by the military judge.

3. Defense Provides no evidence that the members conducted a reconsideration vote[4].

"Absent evidence to the contrary, court members are presumed to comply with the military judge's instructions." *United States v. McFadden*, 74 M.J. 87, 90 (C.A.A.F. 2015) (quoting *United States v. Hornback*, 73 M.J. 155, 161 (C.A.A.F. 2014)). Defense argues that the members defied the Court's instructions and improperly conducted a reconsideration vote, however, they provide no evidence that a reconsideration vote actually occurred, just speculation.

[4] Defense cite in Walter misconstrue the footnote.. relied on a footnote in *United States v. Walters* to raise issue regarding an alleged reconsideration vote in their motion. *Id* n. 5. However, the footnote[4] explicitly suggests that military judge's do exactly what happened in this case, clarify ambiguities before announcements. Defense relied on a footnote in United States v. Walters to raise issue regarding an alleged reconsideration vote in their motion. Id n. 5. However, the footnote explicitly suggests that military judge's do exactly what happened in this case, clarify ambiguities before announcements.

Again, the question on its face is ambiguous. With the presumption that the members followed the judge's instructions, it can be determined that the members had not yet voted on the images, were seeking clarification on how to come to a consensus, and once clarified were able to conduct a vote on the files and complete the findings worksheet.

In the alternative, even if the members did not follow the judge's instructions and conducted a reconsideration vote, there is nothing in case law or in the Rules for Courts-Martial that required the members to make such announcement to the military judge and counsel.

Under R.C.M. 924, reconsideration of findings, "[m]embers may reconsider any finding reached by them before such finding is announced in open session." Although provided in instructions at trial, neither the Rules for Courts-Martial or case law mandates that members open the court to announce a reconsideration has been proposed prior to conducting voting during the reconsideration of findings. Furthermore, the Government is unaware of any rule or case law that if it was somehow disclosed that during the members closed deliberations that a vote for reconsideration of findings was conducted without announcement in court that the military judge has the authority, and the remedy is to set aside a verdict due to the reconsideration vote. Although Defense is not seeking to impeach the findings, the discussion under R.C.M. 923, provides additional guidance that when challenging findings by members "unsound reasoning by a member, misconception of the evidence, or misapplication of the law is not a proper basis for challenging the findings." R.C.M. 923 discussion.

The military judge in the subject case, took the appropriate actions when presented with the members' question and was not required to direct reconsideration due to the members' question. The decision by the military judge in this case is also supported by case law. In *United States v. Perez, 40 M.J. 373 (C.M.A. 1994)*, the Court held that the military judge had authority to direct reconsideration of the inconsistent verdict. Alternatively, military judge could have advised members that findings amounted to a finding of not guilty and advised them of their option to reconsider. In *United States v. Reyes-Lesmes*, 2020 WL 6533831, (ACCA 2020), the Army Court of Criminal Appeals held that the military judge did not direct the members to reconsider their findings and was not required to provide reconsideration instruction to the panel members, but rather instructed the panel to correct an improperly completed findings worksheet.

United States v. Griffith, 27 M.J. 42 (C.M.A. 1988) case highlights the Congressional intent for a military judge to take action and to take remedial measures only if they "become aware of an **error** which has prejudiced the rights of the accused, whether this error involves jury misconduct, misleading instructions, or insufficient evidence." *Id.* at 47. The court in *Griffith* expressed that the military judge[5] "may determine only whether the rights of an accused have been prejudiced by legal error—such as legal insufficiency of the government evidence..." otherwise risk becoming the "thirteenth juror." *Id.*at 48.

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[5] In *Griffith*, members came back with a verdict of guilty and defense counsel requested the members to reconsider their findings under R.C.M. 924, but the members declined. After the announcement of the verdict the military judge stated that he was going to recommend that the convening authority and all reviewing authorities to see if the evidence supports the verdict, and his opinion was that it did not. The C.M.A. also emphasized that the military judge is limited under R.C.M. 917 to make any finding of not guilty to prior to the announcement of findings. United States v. Griffith, 27 M.J. 42, 44-45 (C.M.A. 1988)

In this case, the Military Judge completed all steps recommended by the Rules for Courts-Martial and C.A.A.F. precedent. Members were detailed oriented, engaged, and asked extensive questions of the Court, the Accused, and all other witnesses. Faced with the prospect of an ambiguous verdict, the Court reinstructed the members after consulting the parties. Again, the clarifying instructions resulted in a proper, formal announcement of specific findings, and a correctly completed findings worksheet.

B. THE DEFENSE REQUEST TO SET ASIDE FINDINGS UNDER R.C.M. 1104 FAILS BECAUSE THEY DO NOT CITE OR ADDRESS THE PROPER STANDARD AND THEIR BRIEF DOES NOT ADDRESS SIGNFICANT EVIDENCE CONSIDERED BY THE MEMBERS

The Defense's request that this Court set aside the members guilty verdict on sole specification of Charge I under R.C.M. 1104(b)(1)(B) is flawed in multiple ways. First, the Defense does not cite or address the proper standard for the burden for a determination of legal sufficiency. Second, the Defense's motion leaves out significant evidence, e.g., the accused's testimony, in its argument. All of the evidence clearly shows that it was legally sufficient to sustain a conviction and did. Not only was the evidence sufficient to survive a motion under R.C.M. 917 prior to the accused's testimony denying ever seeing the images found on his personal cell phone, but also it was decided beyond a reasonable doubt by the members the accused knowingly possessed child pornography.

1. Under R.C.M. 1104, viewing the evidence in a light most favorable to the Government, a reasonable factfinder not only could, but did, find each element of the sole specification of Charge I beyond a reasonable doubt.

The test for legal sufficiency of the evidence is whether, viewing the evidence in a light most favorable to the Government, a reasonable factfinder could find each element of the offense beyond a reasonable doubt. See *United States v. Wright*, 42 M.J. 163, 166 (C.A.A.F.1995) (citing *Jackson v. Virginia*, 443 U.S. 307, 318-319 (1979); *United States v. Blocker*, 32 M.J. 281, 284-85 (C.M.A. 1991)). The Defense failed to cite or discuss this standard in their motion. This is significant because an explanation of the standard supports a finding that the guilty verdict rendered in this case should not be set-aside.

The United States Supreme Court has explained that the test for legal sufficiency review is, "[a] familiar standard [that] gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts. Once a defendant has been found guilty of the crime charged, the factfinder's role as weigher of the evidence is preserved through a legal conclusion that upon judicial review *all of the evidence* is to be considered in the light most favorable to the prosecution. The criterion thus impinges upon "jury" discretion only to the extent necessary to guarantee the fundamental protection of due process of law." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979).

2. A review of *all of the evidence* clearly shows that it is sufficient to sustain the Accused's conviction of the sole specification of Charge I.

The Defense contends that the evidence does not support the accused *knowingly* possessed the charged images on his personal cell phone. Although this issue will be reviewed by the appellate court, the military judge and the panel have already both determined that the evidence more than meets the standard for legally sufficiency.

First, the military judge during the R.C.M. 917 motion by Defense after the government's case denied the motion for a finding of not guilty under R.C.M. 917, and then accused took the stand during Defense's case where he testified that he had not seen any of the images offered to prove the specifications that were found on his personal cell phone, which completely contradicted testimony of the government's expert witness that some user interaction with the images for them to have been found on the phone and in cache. Based on *all the evidence* presented at trial, the members convicted the accused beyond a reasonable doubt that the accused knowingly possessed two images of child pornography.

Specifically, the cached files of the images, Image 720d and [redacted].PDF, the accused was found guilty of in Specification 1 were found in the browser cache and the cache of the Hanscom application respectively. The government used the circumstantial evidence that the cache files were evidence of the images being on the accused's cell phone. This scenario is not new or novel to the military justice system.

a. <u>The case law related to cache supports upholding the members' verdict of Guilty on Charge I, Specification 1.</u>

In *United States v. King*, 78 M.J. 218 (2019), C.A.A.F. held that circumstantial evidence that the accused actually saw the three charged images was sufficient to support guilty finding. The accused was convicted of knowingly and wrongfully viewing two images that were found in the Google Chrome cache on his desktop computer, and one image that was found in unallocated space. Similar to the subject case, in *King* the government had a computer forensic expert testify which included testimony that "if a file were present in unallocated space, its presence there would indicate that the particular file had once existed on the computer in logical space but had been deleted at some point."

Fact patterns similar to this case have also withstood legal sufficiency review in federal courts. In *United States v. Tucker*, 305 F.3d 1193 (2002) the court held that the evidence was sufficient to support a finding that defendant knowingly possessed child pornography despite the defendant's argument that he did not knowingly possess and control images of child porn found in his personal computer's cache. In *Tucker*, a law enforcement agent testified that an individual could access an image in a cache file, attach it to an email, post it to a newsgroup, place it on a Web site, or print a hard copy. "Like any other data file, you could do almost anything with it." *Id.* The court found that this unrebutted testimony conclusively demonstrated that the accused had control over images stored in his cache and thus possessed the images under the federal child pornography statute.

In *United States v. Lancina*, 2017 WL 2829303 (N.M.Ct.Crim.App.), court reviewed whether thumbnail images established a substantial basis for probable cause due to the locations on the

computer indicate they are "automatically cached from internet sites onto [the appellant's] work computer." *Lancina* relied upon *Tucker* and states "appellate courts have affirmed that the presence of child pornography thumbnail images in the internet cache can be a basis for possession of child pornography *convictions*. As thumbnail images, in some circumstances, can satisfy the beyond a reasonable doubt standard, we hold they provide a substantial basis...to find probable cause to suspect that the appellant possessed child pornography." *Id.* at 4.

There is also a significant number of unreported decisions that possession charges were factually and legally sufficient when the evidence against the accused included cache files, including browser cache. In *United States v. Morris*, WL 4292024 (N.M.Ct.Crim.App 2014), the court held that the conviction was legally and factually sufficient where the evidence against the accused constituted thumbnail files and were acquired due to automatic caching of his internet browser. In *United States v. Davenport*, 2016 WL 7396719 (Army Ct.Crim.App.) the court held that child pornography found in unallocated space can support a conviction for possession of child pornography. Citing *United States v. McArthuer,* 573 F.3d 608, 614-615 (8th Cir. 2009). Accused in *Davenport* argues that the possession charge is factually and legally insufficient to support a conviction for knowing possession when the evidence of possession was that it was located in the cache of appellants cell phone, and the court disagreed. In *Davenport*, similar to the subject case, a law enforcement agent testified that images found on the cell phone were found in the cache, which is where images that are opened on the device are held. The court held that the accused did knowingly possess the images which were found in the "cache" and "Active" files on his cell phone.

b. <u>The evidence concerning the [redacted].PDF upholding the members' verdict of Guilty on Charge I, Specification 1</u>.

Here, the Government DFE testified that "cache" is the operating system (OS), designed by the OS and various programs to maintain data about the activity that is occurring within that application or device. "[Cache] helps the program work more efficiently, helps the system do things faster than it has already done." (See Enclosure 1). The DFE further explained that when a file is in cache it means that the program has accessed or "touched it in some way" and has had activity with that file and has interpreted that file and stored it in the cache of the respective application. According to the DFE, all images are recorded in various cache. (See Enclosure 1). This testimony was and remains unrebutted.

At trial the evidence showed that the [redacted].PDF was stored in the Hanscom Office Suite of the personal Android cell phone of the Accused. Hanscom Office Suite is the default preinstalled document reviewed and editor that comes with Android devices. The DFE testified that the [redacted].PDF was no longer on the device when the device was seized by law enforcement officers. Although, the actual PDF file was not found on the phone, the file and a thumbnail of the file was found in the cache of the Hanscom Office Suite application. In addition, through his analysis, the DFE also found evidence that the [redacted].PDF was listed in the recent documents database in the Hanscom Office Suite, which listed the 20 documents that were last opened within the application. (See Enclosure 1). The DFE testified that during his analysis of the extraction, he identified the "modified" dates on the [redacted].PDF to be 08 May 2020 2307 AST. The modified date indicated when the file was modified or changed in some way. The DFE

explained that this information allows him to know when [redacted].PDF was opened in the program on the Accused's phone. As explained above and in the DFE's testimony, the cache documents when programs interact with files and saves them to be viewed or opened later more easily. In addition, the DFE testified that evidence that a thumbnail of the document was created. A thumbnail is created of an image or document once it is opened and viewed. The thumbnail is created so that the user can view the document or image in an easier way to view the data.

The DFE's ultimate opinion regarding the [redacted].PDF was that the evidence supported that, "it was on the device, it was opened within the Hanscom Office Suite, and a modification occurred and during that procedure the document and the thumbnail were stored within the cache..." That the [redacted].PDF was stored, opened, and accessed with the device. In addition, in his expert opinion the evidence supported that the actual document was also stored within cache. The evidence that the document was stored in cache and a thumbnail was created means that the program was able to render the PDF, since if the application did not ever make it visible then there would not be a viewable thumbnail. (See Audio 47:15).

This unrebutted testimony, alone, is enough to meet the legal sufficiency standard. But this is not the only evidence the members received. The Defense motion does not discuss the facts elicited from the Accused upon cross examination. The Accused stated that he had never seen the images found in his cache, that he had never interacted with these images, and that he could not explain how they ended up in the cache on his phone. He further stated that no one else had access to his cell phone, including his wife, and that his phone was password protected. Accordingly, the Accused's testimony is in direct conflict with the Government's DFE, who explained via exhibits, how the [redacted].PDF was opened and modified by someone using the Accused's cell phone. Again, in viewing the above evidence in a light most favorable to the Government, a reasonable factfinder could, and did, find each element of the offense beyond a reasonable doubt.

c. <u>The evidence concerning Image 720d supports upholding the members' verdict of Guilty on Charge I, Specification 1</u>.

Again, as with the [redacted].PDF, there is more than enough evidence to support the legal sufficiency determination related to Image 720d. Some of the images used to support the offense of knowing possession of child pornography, were found in the browser cache on the Accused's personal Android cell phone. The Government's DFE and the FBI Digital Forensic Analyst testified that browser cache means that the files at one point interacted with the browser or application. The DFE stated that the pathway for the images included: "...com.ses.android.sbrowser" which is evidence that the images interacted with the sbrowser application on the cell phone. The DFE explained that the "sbrowser" is the default internet browser for Android devices. The government's DFE also testified that the sbrowser application allows for connectivity to websites that are commonly found on the internet and to other files on the device. The DFE testified that the phone will sometimes use the sbrowser to open files or other documents already on the phone, as it will allow the user to view content is understands the code. (See Enclosure 1). When it comes to websites, the DFE testified that for an image that was on a website to be in the sbrowser cache, the user must have visited the website. During his testimony, the DFE specifically reference Image 720d and recognized that it had the same or similar pathway that included the "...[redacted]." The government's DFE

testified that the evidence included in the pathway and the image showing up in the sbrowser cache supported that the file had been accessed by the browser in some manner, either by the internet or local files on the device.

The DFE provided an example of another image, a young girl wearing green shorts, that was not listed as one of the charged offenses but found on the Accused's phone and was also found in browser cache. The DFE testified that young girl wearing green shorts was the same girl wearing green short with unique wallpaper in the background as one of the videos, "[redacted]" that was charged in the distribution offense. The DFE had also testified that he found the title of that video "[redacted]" in the logs/records of the Video LAN Player, which is an application used to view and watch videos on the cell phone. The DFE testified that all of that evidence supported that specific image found in the sbrowser cache of the young girl in green shorts is likely to have had access to the movie in order to cache that specific image from the video. The same video, "[redacted]" that was able to be downloaded by the Alaskan State Troopers on 18 May 2020.

In addition to the Government's DFE's testimony, the Government also presented the testimony of a child development expert who testified that Image 720d, Image 85d5, and two other images in Prosecution Exhibit 18 contain the same girl as the girl in both [redacted] videos, including the image described by the DFE of the girl wearing green shorts.

The above reference images of the same girl in Prosecution Exhibit 18, in addition to Prosecution Exhibit 19 and Prosecution Exhibit 20 on the findings worksheet, were all found in the cache of various other applications on the accused's personal cell phone. The images in Prosecution Exhibit 19 had modified and created dates of 18 May 2020, again, the same date that Alaska State Troopers were able to download the two "[redacted]" videos. This evidence, in conjunction with the government's DFE's testimony that another one of the images found in the browser cache is more than likely an image from that video, and is the same girl in Image 720d, the members can reasonably infer that the Accused knowingly possessed the Image 720d on or about the alleged date.

Furthermore, during trial, the government admitted evidence under M.R.E. 404(b), to include 10 images that included young women depicted as under the age of 18 as well as file names that glorified/sexualized the sexual abuse of children under the age of 18, that were found on the Accused's personal hard drive. The military judge instructed the members that they could use the evidence to support that the Accused had the intent and motive to knowingly possess images of child pornography.

As with the [redacted].PDF, this evidence, alone, would be enough to support the legal sufficiency determination for Image 720d.[6] But this is not the only evidence the members considered. The members heard and saw the Accused's testimony, which, again, could not be reconciled with the evidence presented by the Government. It is clear that the members rejected the Accused's

[6] In addition to the above referenced evidence, it should also be highlighted that the members observed a substantial amount of technical testimony, asked substantive questions to multiple experts and the accused, signifying that they were paying close attention. In addition, the government proposed 11 images on the findings worksheet for the members' consideration, some images that included pathways from other forms of cache, images that contained created and modified dates, and still made specific diligent decisions regarding the images that were voted on determining that the Accused knowingly possessed child pornography.

claims, that they found his testimony to be not credible and self-serving, and that this contributed to their finding of guilty for Charge I, Specification 1. Again, the Defense failed to address this fact in their motion. Thus, in viewing the above evidence in a light most favorable to the Government, a reasonable factfinder could, and did, find each element of the offense beyond a reasonable doubt.

C. NEW TRIAL

In the alternative of setting aside the findings, Defense has requested a new trial. However, C.A.A.F. has stated that requests for a new trial, and thus rehearings and reopenings of trial proceedings, are generally disfavored. Relief is granted only if a "manifest injustice would result absent a new trial, rehearing, or reopening based on proffered newly discovered evidence." *United States v. William,* 37 M.J. at 356. Defense has not presented any new evidence and has not provided any case law that has supported that the actions taken by the military judge when addressing the members' question resulted in a manifest injustice. Rather, the military judge took the appropriate and lawful actions to assist the members in seeking clarification related to the findings worksheet and before the announcement of findings.

RELIEF REQUESTED

The Government respectfully requests the Court deny the Defense's motion for appropriate relief to set aside findings and deny the request for a new trial.

The below ordered transcripts were expedited to be ready by 14 July 2023, but the government had not received all of the below transcripts by the time of this filing. The Government respectfully requests to supplement its motion with the below transcripts once received.

ENCLOSURES

Enclosure 1: Excerpts from Transcript of Government Expert Witness Testimony
Enclosure 2: Excerpts from Transcript of Accused's Testimony
Enclosure 3: Excerpts from Transcript of Initial Findings Instructions
Enclosure 4: Excerpts from Transcript of AE 107 and Reinstructing the Members

CALLAHAN.ERIN.CAT HERINE.[redacted] Digitally signed by CALLAHAN.ERIN.CATHERINE.[redacted] Date: 2023.07.14 21:08:10 -07'00'

ERIN C. CALLAHAN
Lieutenant Commander, USCG
Trial Counsel

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CERTIFICATE OF SERVICE

I certify that I have served a true copy (via email) of the above on Judge Cronin and Defense Counsel on 14 July 2023.

CALLAHAN.ERIN.CAT HERINE.[redacted] Digitally signed by CALLAHAN.ERIN.CATHERINE.[redacted] Date: 2023.07.14 21:09:00 -07'00'

ERIN C. CALLAHAN
Lieutenant Commander, USCG
Trial Counsel

Appellate Exhibit III
Page 20 of 20

COAST GUARD TRIAL JUDICIARY
WESTERN JUDICIAL CIRCUIT
GENERAL COURT-MARTIAL

UNITED STATES v. ERICK R. KELLEY Electronics Technician Second Class U.S. COAST GUARD	GOVERNMENT MOTION FOR APPROPRIATE RELIEF: CLARIFICATION OF COURT'S RULING DTD 01 AUG 2023 01 August 2023

RELIEF SOUGHT

Government moves this Honorable Court for (1) clarification of its ruling on 1 August 2023 as conclusions of law #3 and #4 are not consistent with the Court's analysis and ruling; and (2) an amended ruling if the initial ruling was in error.

FACTS

1. On 1 August 2023, the Court issued its ruling on the Defense Post Trial Motion for Appropriate Relief.

2. The Court wrote in the Analysis section of the ruling: '[redacted]" See Page 7 of Court's Ruling.

3. The Court wrote in the Analysis section of the ruling: "[redacted] Page 9 of the Court's Ruling.

4. However, in the Conclusions of Law section of the Court's ruling, Conclusions #3 and #4 state the evidence regarding the [redacted].pdf and Image 720d is <u>legally insufficient</u>.

5. Finally, the Ruling section of the Court's ruling states, "The Defense's motion is DENIED, consistent with the above conclusions of law."

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Appellate Exhibit 118
Page 1 of 2

LAW AND ARGUMENT

Rule for Courts-Martial 906(a) states that a party to a Courts-Martial may file a motion for appropriate relief to "cure a defect" which deprives a party of a right. Rule for Courts-Martial 908 states that the United States may appeal a finding of not guilty when a military judge enters a finding of not guilty to a charge following the return of a finding of guilty by the members. See R.C.M. 908 (a).

Here the Defense's post-trial motion is requesting that the Court enter a finding of not guilty after the members properly returned a finding of guilty. The Defense requested that the Court find the evidence presented at trial as legally insufficient to support the guilty verdict for possession of child pornography. The Court's ruling states that it ultimately denied the Defense motion, and the Court's analysis is consistent with that ruling. However, Conclusions of Law #3 and #4 are not consistent with the analysis or the ultimate ruling. The Government believes that it is clear, from reading the Court's entire ruling, that the Court intended the conclusions of law to be consistent with its analysis that the evidence admitted in support of the accused wrongfully possessing the [redacted].pdf image and Image 720d was *legally sufficient*. Given the detailed and lengthy analysis, and the ruling itself, the Government believes Conclusions of Law #3 and #4 are simply typographical errors and the Court intended these Conclusions to be consistent with its analysis – that the evidence was legally sufficient as to the two images.

Accordingly, the Government requests that the Court clarify and amend its ruling so that the conclusions of law are consistent with the analysis and ultimate ruling, thereby leaving no confusion for the record.

Respectfully Submitted

CALLAHAN.ERIN.CAT HERINE.[redacted] Digitally signed by CALLAHAN.ERIN.CATHERINE[redacted] Date: 2023.08.02 00:34:35 -07'00'

ERIN C. CALLAHAN
Lieutenant Commander, USCG
Trial Counsel

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CERTIFICATE OF SERVICE

I certify that I have served a true copy (via email) of the above on Judge Cronin and Defense Counsel on 01 August 2023.

CALLAHAN.ERIN.CAT HERINE.[redacted] Digitally signed by CALLAHAN.ERIN.CATHERINE[redacted] Date: 2023.08.02 00:35:01 -07'00'

ERIN C. CALLAHAN
Lieutenant Commander, USCG
Trial Counsel

Appellate Exhibit 118
Page 2 of 2

REQUESTS

THERE ARE NO REQUESTS

NOTICES

IN A GENERAL COURT-MARTIAL OF THE UNITED STATES
U.S. COAST GUARD TRIAL JUDICIARY

UNITED STATES OF AMERICA	)	
	)	NOTICE OF APPEARANCE
v.	)	
	)	
KELLEY, Erik	)	6 June 2022
Petty Officer (ET2)	)	
United States Coast Guard	)	

In accordance with the U Trial Judiciary Rules of Practice before Court-Martial, the undesigned counsel hereby provides notice to this Honorable Court of representation of the Accused. Furthermore, the undersigned affirms:

1. I am an attorney in good standing, licensed to practice law in the states of Oregon (Inactive) and Washington [redacted].

2. I have been previously qualified and certified under Article 27(b) and Sworn under Article 42(a) as an active-duty judge advocate and have never been disqualified from practice.

3. I have not acted in any manner that might tend to disqualify me from this case.

4. I have previously been sworn as individual/civilian defense counsel in courts-martial, but have not yet taken that oath specifically for this case.

5. I can accept service electronically at [redacted]

[redacted]
SEAN F. MANGAN
Civilian Defense Counsel

Appellate Exhibit VIII
Page 1 of 1

UNITED STATES COAST GUARD JUDICIARY
GENERAL COURT-MARTIAL

UNITED STATES v. ERICK KELLEY ET2/E-5, USCG	GOVERNMENT NOTICE OF EXPECTED USE OF VIDEO EVIDENCE 01 MAY 2023

In accordance with paragraph 7.j. of the Trial Management Order dated 13 February 2023, the government provides notice of its expected use of video evidence at the above-captioned court-martial. The Government intends to display the videos via a television screen. The Government may also utilize the television screen during closing argument.

The video exhibits to be used are the videos received by the Alaskan State Trooper on 18 May 2020 from the [redacted], which was later identified to be as associated with the Accused's residence and specifically related to Charge I, specficiation 2. The Government does intend on only publishing a representative portion of each video at trial and will provide Defense the opportunity to review each respective portion specified. The videos are identified below:

[redacted]

Due to the nature of the videos containing contraband, the government has not attached the videos, but has previously provided Defense access to the videos.

Respectfully Submitted,

CALLAHAN.ERIN.C ATHERINE[redacted] Digitally signed by CALLAHAN.ERIN.CATHERINE.[redacted] Date: 2023.05.01 17:09:17 -07'00'

LCDR Erin Callahan, USCG
Trial Counsel

APPELLATE EXHIBIT 33
PAGE 1 OF 1 PAGE (S)

IN A GENERAL COURT-MARTIAL OF THE UNITED STATES
COAST GUARD TRIAL JUDICIARY

UNITED STATES OF AMERICA	)	
	)	FINAL NOTICE OF
v.	)	PLEA AND FORUM
	)	
KELLEY, Erik	)	5 May 2023
Petty Officer (ET2)	)	
United States Coast Guard	)	
	)	

The Defense hereby notifies this Honorable Court of the following elections by the Accused regarding plea and forum for the court-martial now pending:

1. **To plead Not Guilty to all charges and specifications.**

2. **To be tried by a Panel consisting of Enlisted and Officer Members.**

[redacted]
SEAN F. MANGAN
Civilian Defense Counsel

CERTIFICATE OF SERVICE

I hereby certify that I caused this pleading to be filed electronically on the Court and Government Counsel on 5 May 2023 (Sender's Time Zone).

[redacted]
SEAN F. MANGAN
Civilian Defense Counsel

APPELLATE EXHIBIT 41
PAGE 1 OF 1 PAGE (S)

COURT RULINGS & ORDERS

GENERAL COURT-MARTIAL
UNITED STATES COAST GUARD

UNITED STATES v. ET2 ERICK KELLEY U.S. Coast Guard	RULING ON DEFENSE POST TRIAL MOTION FOR APPROPRIATE RELIEF 1 August 2023

RELIEF SOUGHT

The Defense moves post-trial to set aside the findings of guilty as announced at trial, or in the alternative, for a new trial. AE 110. The Government opposes the Defense motion. AE 111. Neither party requested oral argument, and accordingly, there was no post-trial Article 39(a) to hear argument. The Defense's motion is denied, consistent with the conclusions of law detailed below.

ISSUES PRESENTED

1. Did the members' question during deliberations amount to the announcement of a not guilty finding?
2. Did the members improperly conduct a reconsideration vote?
3. Was the evidence admitted at trial supporting the finding that the accused wrongfully possessed the [redacted].pdf image legally insufficient?
4. Was the evidence admitted at trial supporting the finding that the accused wrongfully possessed the Image 52D5 legally insufficient?

FINDINGS OF FACT

1. As the proponent of the evidence, the Defense has the burden. In reaching its findings of fact and conclusions of law, the Court considered all legal and competent evidence presented and the reasonable inferences drawn therefrom, and resolved all issues of credibility. The Court makes the following findings of fact by a preponderance of the evidence:

2. The accused, ET2 Kelley, was charged with possessing and distributing child pornography in violation of Article 134, UCMJ.

3. Trial before members began on 15 May 2023.

4. On 21 May 2023, following completion of the Government and Defenses' cases and after closing arguments, the military judge provided the following pertinent instructions:

[redacted]

[redacted]

5. The military judge confirmed with the panel president whether he understood and was following the instructions. The panel president confirmed he understood the instructions.

6. The military judge then explained page three of the findings worksheet stating:

[redacted]

7. The military judge then explained that if there were questions during deliberations, he would open the court and assist the members.

8. After providing these instructions, a panel member asked for the military judge to restate instructions on voting and whether they vote on the elements of the charge. The military judge restated that the members would vote on specifications first and then on the charge. The member indicated the military judge's answer was sufficient.

9. After several hours of deliberations on 21 May 2023, the members provided a question to the bailiff, which has been labeled as AE 107. During an Article 39(a) session, the military judge read aloud the question to counsel:

[redacted]

10. Following the reading of the members' question, the military judge and the parties discussed their initial positions and how the question should be interpreted.

11. The Government's initial position was that if the members had found the accused

guilty of the possession charge but checked any of the images listed on page 3 of the findings worksheet, it would amount to a general verdict.

12. The Defense's initial position was that the question by the members necessitated the military judge entering a finding of not guilty as to the possession charge. Concerning the theory of a general verdict, the Defense countered that the theory of a general verdict was no longer available, since, in its view, the members had stated that they did not have a majority concerning any image presented by the Government in the case.

13. The military judge then took a recess.

14. After coming back on the record, the military judge again asked for the parties' positions. Trial Counsel then stated that, after further review of the members' question, it was apparent that the members' were clearly seeking clarification on instructions, and recommended that the military judge reinstruct the members.

15. The Defense disagreed and argued the members revealed, through the question, that they had reached findings for the possession offense and that they found the accused not guilty because they could not come to an agreement on any piece of evidence. The Defense requested the military judge direct a finding of not guilty.

16. The military judge proposed restating portions of the instructions that had already been provided prior to deliberations, which included the instructions on voting. Additionally, the military judge proposed adding an instruction concerning voting on the specific images. Specifically, he proposed stating:

17. Neither party objected to the proposed instructions.

18. The military judge did not specifically rule on the Defense's proposed way ahead.

19. The military judge called the court members and instructed them as follows:

[redacted]

20. The military judge also reread the instruction concerning the reconsideration procedure.

21. The military judge stated that any additional questions by the members must be written down and provided to the military judge.

22. At 1926, about 30 minutes later, the members' indicated they had a verdict. The court was called to order and the panel provided the findings worksheet to the military judge for review.

23. The president announced the findings, which indicated a finding of guilty for possessing child pornography and not guilty for distributing child pornography.

24. On the third page of the findings worksheet, the members checked next to [redacted].PDF and Image 720d.

25. *Further facts necessary for an appropriate ruling are contained within the Analysis section.*

PRINCIPLES OF LAW

Members' deliberations and announcement of findings

"After the military judge instructs the members on findings, the members shall deliberate and vote in a closed session. Only the members shall be present during deliberations and voting." R.C.M. 921(a). "Deliberations properly include full and free discussion of the merits of the case." R.C.M. 921(b).

Inquiry into the members' deliberations or deliberative process is normally prohibited. *See United States v. Loving* 41 M.J. 213, 235-239 (C.A.A.F. 1994) (*citing Tanner v. United States*, 483 U.S. 107, 107 (1987)); *see also United States v. Brooks*, 41 M.J. 792, 796-797 (A.C.C.A. 1995) (citations omitted). This prohibition extends to inquiry concerning voting irregularities. *Id.* "Except as provided in Mil.R.Evid. 606, members may not be questioned about their deliberations and voting." R.C.M. 922(e). M.R.E. 606(b)(1) states: "During an inquiry into the validity of a finding or sentence, a member of a court martial may not testify about any statement made or incident that occurred during the deliberations of that court martial; the effect of anything on that member's or another member's vote; or any member's mental processes concerning the

finding or sentence. The military judge may not receive a member's affidavit or evidence of a member's statement on these matters."

M.R.E. 606(b) is a "blanket prohibition [which] applies to testimony of court members about 'any matter,' " and "makes incompetent any testimony from jurors about the decision-making process of the jury as well as the mental processes of individual jurors." *Loving*, 41 M.J. at 236 (holding that affidavits regarding whether panel President followed the military judge's instructions were "not competent evidence" under M.R.E. 606(b)). *See also United States v. Lanzafame*, 2016 WL 1443798, at *2 (N.M.Ct.Crim.App., 2016) (disregarding evidence by member concerning deliberative process); *United States v. Combs*, 41 M.J. 400, 401 (C.A.A.F.1995) (finding that "even if the court member's comment was evidence that the court members may have failed to heed the military judge's ... [instructions,] consideration of such evidence was prohibited by MIL. R. EVID. 606(b).") (citations omitted); *United States v. Hollingsworthmata*, 72 M.J. 619, 622–23 (Army Ct.Crim.App.2012) (holding that an affidavit indicating members failed to follow military judge's instruction regarding the accused's right to remain silent did not fall within exceptions to MIL. R. EVID. 606(b)).

R.C.M. 923 further prohibits the impeachment of members' announced findings except under very limited circumstances:

> Findings which are proper on their face may be impeached only when extraneous prejudicial information was improperly brought to the attention of a member, outside influence was improperly brought to bear on any member, or unlawful command influence was brought to bear upon any member.

"After the members have reached findings on each charge and specification before them, the court-martial shall be opened and the president shall inform the military judge that findings have been reached. The military judge may, in the presence of the parties, examine any writing which the president intends to read to announce the findings and may assist the members in putting the findings in proper form. Neither that writing nor any oral or written clarification or discussion concerning it shall constitute announcement of the findings." R.C.M. 921(d).

"A finding on the guilt or innocence of the accused is not final until it is formally and correctly announced in open court." *United States v. Trew*, 68 M.J. 364 (C.A.A.F. 2010) (*citing United States v. London*, 4 C.M.A 90, 96, 15 C.M.R. 90, 96 (1954)). "The announcement of a verdict is sufficient if it decides the questions in issue in such a way as to enable the court intelligently to base judgment thereon and can form the basis for a bar to subsequent prosecution for the same offense." *United States v. Perkins*, 56 M.J. 825, 827 (A.Ct.Crim.App.2001). Findings "shall be announced in the presence of all parties promptly after they have been determined" and only the president can announce findings, in a court-martial by members. R.C.M. 922(b). The Discussion to R.C.M. 922(b) states "if the findings announced are ambiguous, the military judge should seek clarification."

Legal Sufficiency

R.C.M. 1104(b)(1)(B) permits post-trial motions to address, among other things, "a motion to set aside one or more findings because the evidence is legally insufficient." "The test for legal sufficiency is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *United States v. King*, 78 M.J. 218, 221 (C.A.A.F. 2019)(internal citations and quotations omitted). "This legal sufficiency assessment draw[s] every reasonable inference from the evidence of record in favor of the prosecution." *Id.* "As such, the standard for legal sufficiency involves a very low threshold to sustain a conviction." *Id.* "The criterion thus impinges upon 'jury' discretion only to the extent necessary to guarantee the fundamental protection of due process of law. *Id.*

ANALYSIS

The Court finds that the members' question to the Military Judge was not an announcement of findings.

The Defense moves first to set aside the guilty finding to Specification 1 of the Charge, or in the alternative, for a new trial. The motion is denied, and the Court finds that the members' question during deliberations did not amount to the announcement of a finding of not guilty. During trial, after being given the standard procedural instructions on findings and after several hours of deliberation, the members posed the question at issue in this post-trial motion. *See* AE 107. The question indicates that the members had voted on the specifications but neither the question nor CDR [redacted] the panel president, indicated whether the panel had found the accused guilty or not guilty of either of the offenses and whether the findings worksheet had been completed. Likewise, neither the question nor CDR [redacted] indicated that the members had reached a verdict. Finally, neither the question nor CDR [redacted] indicated specifically whether or not they had voted concerning the images and videos listed on page three of the findings worksheet. The statements within the members' question "we don't have ¾ majority on any individual files. We weren't clear on how to come to consensus on each file (page 3 of 3) or if that's required" does not indicate whether they had voted on the specific files listed on the third page of the findings worksheet. This comment may have referred to a number of stages of the deliberative process, including the "full and deliberative discussion" envisioned by R.C.M. 921(d). The statement "we weren't clear on how to come to consensus" suggests that they had not voted regarding the specific files. As such, there was significant ambiguity about the nature of the question and where in the deliberative process the members were at the time of the question. The question itself, given this ambiguity, certainly does not represent the announcement of a finding of any kind and does not represent a not guilty finding concerning Specification 1 of the Charge.

Unlike many of the cases cited in support of the parties' positions, the question from the members was not posed after the members indicated they had reached a verdict,

filled out the findings worksheet, and forwarded it to the military judge. *See e.g., United States v. Perez*, 40 M.J. 373(C.M.A. 1994) and *United States v. Reyes-Lesmes*, 2020 WL 6533831, (ACCA 2020). The question posed here came earlier. The members indicated that they had voted on the specifications but "weren't clear on how to come to a consensus" regarding the files listed on page three. At this point within the members' deliberative process, the panel president gave no indication that they had reached a verdict or completed their deliberations and voting. It would have been inappropriate to further question and clarify with the members what had either happened in the deliberation room or where the panel stood with respect to voting on the charges and specifications. *See* R.C.M. 922(e); M.R.E. 606(b). Without objection, the military judge again provided the standard procedural instructions on voting, and regarding the question on how to come to a consensus on the list of images, instructed the members, again without objection, that "you must also have at least 6 votes of guilty regarding any specific image or video." Finally, the military judge reminded the members about the procedure concerning reconsideration.

There is no evidence suggesting the members did not follow the military judge's instructions. *See Loving*, 41 M.J. at 235 (*citing United States v. Holt*, 33 MJ 400, 408 (CMA 1991) (members are presumed to follow the military judge's instructions). If, as the members' question appears to suggest, they had not voted concerning the individual files, the members were instructed on how to do so without inquiring into their deliberative process. There is no evidence or reason to believe, having been instructed twice on the procedure concerning reconsideration, that the members would not have followed the court's instructions to request instructions on reconsideration as necessary.

The Court finds that the Defense has failed to meet its burden to show that the members engaged in an improper reconsideration vote.

The Court's finding is based on the analysis above. The stage of the deliberative process during which the question was posed is unclear. The Defense infers that the statement indicating that the members had voted on the specifications but didn't "have ¾ majority on any individual files. We weren't clear on how to come to consensus on each file (page 3 of 3) or if that's required" necessitates inferences and findings that (1) the members had in fact voted on the individual files listed on page three, and (2) therefore, must have engaged in an improper reconsideration by finding the accused guilty of possessing two images. In support, the Defense points to the amount of time that elapsed between deliberations recommencing after the question was asked and the members' indicating that they had reached a verdict. The Court finds that this is not sufficient evidence that a reconsideration vote occurred. The Court further notes that the findings worksheet did not have any additional markings on it, which may have suggested that the panel had voted and then changed their finding.

The evidence admitted in support of the accused wrongfully possessing the [redacted].pdf image was legally sufficient.

The Defense argues that the evidence admitted at trial concerning possession of the [redacted].pdf image was legally insufficient because the image did not exist in a location

where the accused could access it (i.e. the Hancom Office Suite cache), and there was no evidence supporting his knowing possession of the image.

The Government's response focuses primarily on testimony by the Government's Digital Forensics Expert (DFE). The Court reviewed his testimony and notes the following. The DFE testified that "cache" is a program used to maintain data about the activity that is occurring within that application or device. "[Cache] helps the program work more efficiently, helps the system do things faster than it has already done." The DFE further explained that when a file is in cache it means that the program has accessed or has "touched" it in some way; has interpreted that file; and stored it in the cache of the respective application. When a file is in cache, it means the file has had some interaction with the program. According to the DFE, all the images at issue in the case were recorded in various cache.

The DFE further testified that the [redacted].pdf file was not recovered from the device, but the file and a thumbnail of the file were located and recovered from the Hancom Office Suite cache of the cell phone seized from the accused. Hancom Office Suite is the default, preinstalled document reviewer and editor that comes with Android devices. The DFE also found the file name [redacted].PDF listed in the "recents" database associated with the Hancom Office Suite. This database listed the 20 files that were last opened on the phone by the Hancom Office Suite. [redacted].pdf was one of those files. The DFE testified that the recents databased included a "modified" date for each file listed. The modified date indicates when the file was last opened in the Hancom Office Suite. Regarding the [redacted].PDF file, the DFE identified the modified time and date, after a conversion, as 2307 Alaskan time on 08 May 2020. The DFE indicated that this date and time was the last time [redacted].PDF was opened and modified in the Hancom Office Suite.

The DFE's ultimate opinion regarding the [redacted].PDF was that '[redacted].pdf was on the device, it was opened within the Hancom Office Suite, and then a modification occurred and during that procedure the document and the thumbnail were stored within the cache…" In addition, in his expert opinion, the evidence supported that the actual document was stored within the Hancom Office Suite cache. Finally, in his expert opinion, that the document was stored in cache and a thumbnail was created means that the program was able to fully render the PDF, since if the application did not ever make it visible then there would not be a viewable thumbnail.

The Defense vigorously cross-examined the Government's DFE. He agreed that a user could not access cache; that the [redacted] file was not found in any other location except the cache; that there was no direct evidence that the accused had accessed the [redacted].pdf file; that the recents database did not include other evidence of CSAM; and that there were no chats, texts, or other communications found on the phone suggesting the accused had possessed or distributed CSAM. The DFE, however, did not withdraw or modify his expert opinion concerning the [redacted].pdf file and that it was opened on the device.

The Government's response also referenced the accused's testimony. The Court reviewed his testimony and notes that the accused stated that he had never seen the

images found in his cache, that he had never interacted with these images, and that he could not explain how they ended up in the cache on his phone. He further stated that his phone was password protected, that he was the only one who downloaded pornography on his phone, and that no one else had access to the phone, although it's possible his wife may have gained access.

Having reviewed the evidence and arguments of both parties, the Court finds that after viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *See King*, 78 M.J. at 221. The Court agrees with the Defense that the government was required to prove that the accused knowingly possessed the images. The Court also agrees that for images found in the cache, the government typically meets its burden using circumstantial evidence. *See, e.g., King,* 78 MJ at 218 (C.A.A.F. 2019); *United States v. Moss*, 2023 CCA LEXIS 158 (A.F. Ct. Crim. App. 2023); and *United States v. Lyle*, 2022 CCA LEXIS 568 (N-M Ct. Crim. App. 2022). While the Government arguably did not present any direct evidence of the accused's knowledge, there was circumstantial evidence presented supporting the accused's knowing possession, including the image being found in cache, the image being listed in the "recents" database indicating it was opened in the Hancom Office Suite in May 2020; the DFE's expert opinion that the [redacted] file was opened by the Hancom Office Suite of the phone on or about the date charged; and the DFE's opinion that the image was fully rendered, allowing the phone to capture a thumbnail of the image. Further, the accused testified that the phone was password protected, and no one else had access.

The evidence admitted in support of the accused wrongfully possessing the Image 720d image was legally sufficient.

The Defense argues that the evidence admitted at trial concerning possession of Image 720d was legally insufficient because the image did not exist in a location where the accused could access it (i.e. the browser cache); there was no evidence supporting his knowing possession of the image; and there was no evidence supporting his possession of the image on the date charged.

The Government's response again includes reference to the DFE's testimony. The Court reviewed his testimony and notes the following. The DFE testified that Image 720d was found in the sbrowser cache on the phone seized from the accused. The DFE explained that the "sbrowser" is the default internet browser for Android devices and that the sbrowser application may be used to connect and view files on websites on the internet and may also be used to open files or other documents already on the phone. The government's DFE testified that the image being found in the sbrowser cache supported that 720d had been accessed by the browser on the accused's phone in some manner, either through the internet or through local files on the device.

The DFE further testified that an image depicting a young female wearing green shorts was found in the browser cache of the phone seized from the accused. The DFE testified that the young female wearing green shorts appeared to be the same girl wearing green shorts in the video [redacted] that was charged in Specification 2 of the

Charge. The DFE also testified that he found the title of that video [redacted] in the logs/records of the Video LAN Player, which is an application used to view and watch videos on the cell phone. The DFE testified that it would be incredibly unlikely that the image found in the sbrowser cache of the young girl in green shorts did not come from the video [redacted]" The same video, [redacted] was downloaded by the Alaskan State Troopers on 18 May 2020 using an IP address associated with the accused's home.

The Government also presented the testimony of a child development expert who testified that Image 720d, Image 85d5, Image 7992, and Image 5628 all appeared to depict the same person, and all appeared to depict the same girl who appeared in both [redacted] videos, who was wearing green shorts. On cross, the expert conceded that the images could be different people but maintained his opinion that he believed they were the same person. He stated it would be "highly unlikely" that the images and videos depicted different people.

Regarding the Defense's argument that the accused did not knowingly possess Image 720d on or about the date charged, the Government argues that the members could have concluded that the girl depicted in Image 720d was the same girl depicted in the [redacted]" videos, which were downloaded by the Alaska State Troopers on 18 May 2020 from an IP address registered to the accused's home. Further, the Government argues that, like Image 720d, the other images charged in this case (i.e. those described in Prosecution Exhibits 19 and 20) were all found in the cache of various other applications on the accused's personal cell phone. Further, the images in Prosecution Exhibit 19 had modified and created dates of 18 May 2020. The Government argues that this evidence, in conjunction with the DFE's testimony concerning the image found in the browser cache which he believed came from '[redacted] the members could reasonably infer that the accused knowingly possessed Image 720d on or about the date charged.

The government further points to evidence admitted pursuant to M.R.E. 404(b). This evidence included images of young women portrayed as being under the age of 18. The file names of those images used words associated with younger women, including words such as "nubile." The military judge instructed the members that they could use this evidence for its tendency to prove the accused's intent and motive to knowingly possess images of child pornography.

Finally, the Government's response again referenced the accused's testimony. Again, the accused stated that he had never seen the images found in his cache, that he had never interacted with these images, and that he could not explain how they ended up in the cache on his phone. He further stated that his phone was password protected, that he was the only one who downloaded pornography on his phone, and that no one else had access to the phone, although it's possible his wife may have gained access.

Again, having reviewed the evidence and arguments of both parties, the Court finds that after viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *See King*, 78 M.J. at 221. There was, again, circumstantial evidence

presented supporting the accused's knowing possession of Image 720d on or about the charged date. The evidence suggested this image was found in the browser cache of the accused's phone, which he testified was password protected and to which no one else had access. Additionally, the members could reasonably have determined that the girl depicted in Image 720d was the same girl in [redacted] that Image 720d was knowingly possessed on or about 18 March 2020, the date the videos were downloaded and the date corresponding to the "created on" date of other images seized by the Government.

CONCLUSIONS OF LAW

1. The members' question during deliberations did not amount to the announcement of a not guilty finding.
2. The Defense has failed to meet its burden to demonstrate that the members' improperly conduct a reconsideration vote.
3. The evidence admitted at trial supporting the finding that the accused wrongfully possessed the [redacted].pdf image is legally insufficient.
4. The evidence admitted at trial supporting the finding that the accused wrongfully possessed Image 720d is legally insufficient.

RULING

The Defense's motion is DENIED, consistent with the above conclusions of law.

01 August 2023

CRONIN.TIMOTHY.N.[redacted] Digitally signed by CRONIN.TIMOTHY.N.[redacted] Date: 2023.08.01 16:33:56 -04'00'

Timothy N. Cronin
Commander, U.S. Coast Guard
Military Judge

GENERAL COURT-MARTIAL
UNITED STATES COAST GUARD

UNITED STATES v. ET2 ERICK KELLEY U.S. Coast Guard	AMENDED RULING ON DEFENSE POST TRIAL MOTION FOR APPROPRIATE RELIEF 02 August 2023

RELIEF SOUGHT

The Defense moves post-trial to set aside the findings of guilty as announced at trial, or in the alternative, for a new trial. (AE 110). The Government opposes the Defense motion. (AE 111-114). Neither party requested oral argument, and accordingly, there was no post-trial Article 39(a) to hear argument. The Court issued its written ruling on 01 August 2023. The Government then moved for clarification, citing the apparent inconsistency between the ruling's indication that the motion was denied and the conclusions of law listed at the end of the ruling. There were two typographical errors in the conclusions of law section. Conclusions of law three and four should have stated that the evidence admitted in support of the accused's possession of the two images was legally sufficient, not insufficient. This amended version of the ruling fixes the typographical errors. The Defense's motion is denied, consistent with the conclusions of law detailed below.

ISSUES PRESENTED

1. Did the members' question during deliberations amount to the announcement of a not guilty finding?
2. Did the members improperly conduct a reconsideration vote?
3. Was the evidence admitted at trial supporting the finding that the accused wrongfully possessed the [redacted].pdf image legally insufficient?
4. Was the evidence admitted at trial supporting the finding that the accused wrongfully possessed the Image 52D5 legally insufficient?

FINDINGS OF FACT

1. As the proponent of the evidence, the Defense has the burden. In reaching its findings of fact and conclusions of law, the Court considered all legal and competent evidence presented and the reasonable inferences drawn therefrom, and resolved all issues of credibility. The Court makes the following findings of fact by a preponderance of the evidence:

2. The accused, ET2 Kelley, was charged with possessing and distributing child

pornography in violation of Article 134, UCMJ.

3. Trial before members began on 15 May 2023.

4. On 21 May 2023, following completion of the Government and Defenses' cases and after closing arguments, the military judge provided the following pertinent instructions:

5. The military judge confirmed with the panel president whether he understood and was following the instructions. The panel president confirmed he understood the instructions.

6. The military judge then explained page three of the findings worksheet stating:

7. The military judge then explained that if there were questions during deliberations, he would open the court and assist the members.

8. After providing these instructions, a panel member asked for the military judge to restate instructions on voting and whether they vote on the elements of the charge. The military judge restated that the members would vote on specifications first and then on the charge. The member indicated the military judge's answer was sufficient.

9. After several hours of deliberations on 21 May 2023, the members provided a question to the bailiff, which has been labeled as AE 107. During an Article 39(a) session, the military judge read aloud the question to counsel:

[redacted]

10. Following the reading of the members' question, the military judge and the parties discussed their initial positions and how the question should be interpreted.

11. The Government's initial position was that if the members had found the accused guilty of the possession charge but checked any of the images listed on page 3 of the findings worksheet, it would amount to a general verdict.

12. The Defense's initial position was that the question by the members necessitated the military judge entering a finding of not guilty as to the possession charge. Concerning the theory of a general verdict, the Defense countered that the theory of a general verdict was no longer available, since, in its view, the members had stated that they did not have a majority concerning any image presented by the Government in the case.

13. The military judge then took a recess.

14. After coming back on the record, the military judge again asked for the parties' positions. Trial Counsel then stated that, after further review of the members' question, it was apparent that the members' were clearly seeking clarification on instructions, and recommended that the military judge reinstruct the members.

15. The Defense disagreed and argued the members revealed, through the question, that they had reached findings for the possession offense and that they found the accused not guilty because they could not come to an agreement on any piece of evidence. The Defense requested the military judge direct a finding of not guilty.

16. The military judge proposed restating portions of the instructions that had already been provided prior to deliberations, which included the instructions on voting. Additionally, the military judge proposed adding an instruction concerning voting on the specific images. Specifically, he proposed stating:

[redacted]

[redacted]

17. Neither party objected to the proposed instructions.

18. The military judge did not specifically rule on the Defense's proposed way ahead.

19. The military judge called the court members and instructed them as follows:

[redacted]

20. The military judge also reread the instruction concerning the reconsideration procedure.

21. The military judge stated that any additional questions by the members must be written down and provided to the military judge.

22. At 1926, about 30 minutes later, the members' indicated they had a verdict. The court was called to order and the panel provided the findings worksheet to the military judge for review.

23. The president announced the findings, which indicated a finding of guilty for possessing child pornography and not guilty for distributing child pornography.

24. On the third page of the findings worksheet, the members checked next to [redacted] and Image 720d.

25. *Further facts necessary for an appropriate ruling are contained within the Analysis section.*

PRINCIPLES OF LAW

Members' deliberations and announcement of findings

"After the military judge instructs the members on findings, the members shall deliberate and vote in a closed session. Only the members shall be present during

deliberations and voting." R.C.M. 921(a). "Deliberations properly include full and free discussion of the merits of the case." R.C.M. 921(b).

Inquiry into the members' deliberations or deliberative process is normally prohibited. *See United States v. Loving* 41 M.J. 213, 235-239 (C.A.A.F. 1994) (*citing Tanner v. United States*, 483 U.S. 107, 107 (1987)); *see also United States v. Brooks*, 41 M.J. 792, 796-797 (A.C.C.A. 1995) (citations omitted). This prohibition extends to inquiry concerning voting irregularities. *Id.* "Except as provided in Mil.R.Evid. 606, members may not be questioned about their deliberations and voting." R.C.M. 922(e). M.R.E. 606(b)(1) states: "During an inquiry into the validity of a finding or sentence, a member of a court martial may not testify about any statement made or incident that occurred during the deliberations of that court martial; the effect of anything on that member's or another member's vote; or any member's mental processes concerning the finding or sentence. The military judge may not receive a member's affidavit or evidence of a member's statement on these matters."

M.R.E. 606(b) is a "blanket prohibition [which] applies to testimony of court members about 'any matter,' " and "makes incompetent any testimony from jurors about the decision-making process of the jury as well as the mental processes of individual jurors." *Loving*, 41 M.J. at 236 (holding that affidavits regarding whether panel President followed the military judge's instructions were "not competent evidence" under M.R.E. 606(b)). *See also United States v. Lanzafame*, 2016 WL 1443798, at *2 (N.M.Ct.Crim.App., 2016) (disregarding evidence by member concerning deliberative process); *United States v. Combs*, 41 M.J. 400, 401 (C.A.A.F.1995) (finding that "even if the court member's comment was evidence that the court members may have failed to heed the military judge's ... [instructions,] consideration of such evidence was prohibited by MIL. R. EVID. 606(b).") (citations omitted); *United States v. Hollingsworthmata*, 72 M.J. 619, 622–23 (Army Ct.Crim.App.2012) (holding that an affidavit indicating members failed to follow military judge's instruction regarding the accused's right to remain silent did not fall within exceptions to MIL. R. EVID. 606(b)).

R.C.M. 923 further prohibits the impeachment of members' announced findings except under very limited circumstances:

> Findings which are proper on their face may be impeached only when extraneous prejudicial information was improperly brought to the attention of a member, outside influence was improperly brought to bear on any member, or unlawful command influence was brought to bear upon any member.

"After the members have reached findings on each charge and specification before them, the court-martial shall be opened and the president shall inform the military judge that findings have been reached. The military judge may, in the presence of the parties, examine any writing which the president intends to read to announce the findings and may assist the members in putting the findings in proper form. Neither that writing nor any oral or written clarification or discussion concerning it shall constitute announcement of the findings." R.C.M. 921(d).

"A finding on the guilt or innocence of the accused is not final until it is formally and correctly announced in open court." *United States v. Trew*, 68 M.J. 364 (C.A.A.F. 2010) (*citing United States v. London*, 4 C.M.A 90, 96, 15 C.M.R. 90, 96 (1954)). "The announcement of a verdict is sufficient if it decides the questions in issue in such a way as to enable the court intelligently to base judgment thereon and can form the basis for a bar to subsequent prosecution for the same offense." *United States v. Perkins*, 56 M.J. 825, 827 (A.Ct.Crim.App.2001). Findings "shall be announced in the presence of all parties promptly after they have been determined" and only the president can announce findings, in a court-martial by members. R.C.M. 922(b). The Discussion to R.C.M. 922(b) states "if the findings announced are ambiguous, the military judge should seek clarification."

Legal Sufficiency

R.C.M. 1104(b)(1)(B) permits post-trial motions to address, among other things, "a motion to set aside one or more findings because the evidence is legally insufficient." "The test for legal sufficiency is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *United States v. King*, 78 M.J. 218, 221 (C.A.A.F. 2019)(internal citations and quotations omitted). "This legal sufficiency assessment draw[s] every reasonable inference from the evidence of record in favor of the prosecution." *Id.* "As such, the standard for legal sufficiency involves a very low threshold to sustain a conviction." *Id.* "The criterion thus impinges upon 'jury' discretion only to the extent necessary to guarantee the fundamental protection of due process of law. *Id.*

ANALYSIS

The Court finds that the members' question to the Military Judge was not an announcement of findings.

The Defense moves first to set aside the guilty finding to Specification 1 of the Charge, or in the alternative, for a new trial. The motion is denied, and the Court finds that the members' question during deliberations did not amount to the announcement of a finding of not guilty. During trial, after being given the standard procedural instructions on findings and after several hours of deliberation, the members posed the question at issue in this post-trial motion. *See* AE 107. The question indicates that the members had voted on the specifications but neither the question nor CDR [redacted], the panel president, indicated whether the panel had found the accused guilty or not guilty of either of the offenses and whether the findings worksheet had been completed. Likewise, neither the question nor CDR [redacted] indicated that the members had reached a verdict. Finally, neither the question nor CDR [redacted] indicated specifically whether or not they had voted concerning the images and videos listed on page three of the findings worksheet. The statements within the members' question "we don't have ¾ majority on any individual files. We weren't clear on how to come to consensus on each

file (page 3 of 3) or if that's required" does not indicate whether they had voted on the specific files listed on the third page of the findings worksheet. This comment may have referred to a number of stages of the deliberative process, including the "full and deliberative discussion" envisioned by R.C.M. 921(d). The statement "we weren't clear on how to come to consensus" suggests that they had not voted regarding the specific files. As such, there was significant ambiguity about the nature of the question and where in the deliberative process the members were at the time of the question. The question itself, given this ambiguity, certainly does not represent the announcement of a finding of any kind and does not represent a not guilty finding concerning Specification 1 of the Charge.

Unlike many of the cases cited in support of the parties' positions, the question from the members was not posed after the members indicated they had reached a verdict, filled out the findings worksheet, and forwarded it to the military judge. *See e.g., United States v. Perez*, 40 M.J. 373(C.M.A. 1994) and *United States v. Reyes-Lesmes*, 2020 WL 6533831, (ACCA 2020). The question posed here came earlier. The members indicated that they had voted on the specifications but "weren't clear on how to come to a consensus" regarding the files listed on page three. At this point within the members' deliberative process, the panel president gave no indication that they had reached a verdict or completed their deliberations and voting. It would have been inappropriate to further question and clarify with the members what had either happened in the deliberation room or where the panel stood with respect to voting on the charges and specifications. *See* R.C.M. 922(e); M.R.E. 606(b). Without objection, the military judge again provided the standard procedural instructions on voting, and regarding the question on how to come to a consensus on the list of images, instructed the members, again without objection, that "you must also have at least 6 votes of guilty regarding any specific image or video." Finally, the military judge reminded the members about the procedure concerning reconsideration.

There is no evidence suggesting the members did not follow the military judge's instructions. *See Loving*, 41 M.J. at 235 (*citing United States v. Holt*, 33 MJ 400, 408 (CMA 1991) (members are presumed to follow the military judge's instructions). If, as the members' question appears to suggest, they had not voted concerning the individual files, the members were instructed on how to do so without inquiring into their deliberative process. There is no evidence or reason to believe, having been instructed twice on the procedure concerning reconsideration, that the members would not have followed the court's instructions to request instructions on reconsideration as necessary.

The Court finds that the Defense has failed to meet its burden to show that the members engaged in an improper reconsideration vote.

The Court's finding is based on the analysis above. The stage of the deliberative process during which the question was posed is unclear. The Defense infers that the statement indicating that the members had voted on the specifications but didn't "have ¾ majority on any individual files. We weren't clear on how to come to consensus on each file (page 3 of 3) or if that's required" necessitates inferences and findings that (1) the members had in fact voted on the individual files listed on page three, and (2) therefore,

must have engaged in an improper reconsideration by finding the accused guilty of possessing two images. In support, the Defense points to the amount of time that elapsed between deliberations recommencing after the question was asked and the members' indicating that they had reached a verdict. The Court finds that this is not sufficient evidence that a reconsideration vote occurred. The Court further notes that the findings worksheet did not have any additional markings on it, which may have suggested that the panel had voted and then changed their finding.

The evidence admitted in support of the accused wrongfully possessing the [redacted].pdf image was legally sufficient.

The Defense argues that the evidence admitted at trial concerning possession of the [redacted].pdf image was legally insufficient because the image did not exist in a location where the accused could access it (i.e. the Hancom Office Suite cache), and there was no evidence supporting his knowing possession of the image.

The Government's response focuses primarily on testimony by the Government's Digital Forensics Expert (DFE). The Court reviewed his testimony and notes the following. The DFE testified that "cache" is a program used to maintain data about the activity that is occurring within that application or device. "[Cache] helps the program work more efficiently, helps the system do things faster than it has already done." The DFE further explained that when a file is in cache it means that the program has accessed or has "touched" it in some way; has interpreted that file; and stored it in the cache of the respective application. When a file is in cache, it means the file has had some interaction with the program. According to the DFE, all the images at issue in the case were recorded in various cache.

The DFE further testified that the [redacted].pdf file was not recovered from the device, but the file and a thumbnail of the file were located and recovered from the Hancom Office Suite cache of the cell phone seized from the accused. Hancom Office Suite is the default, preinstalled document reviewer and editor that comes with Android devices. The DFE also found the file name [redacted].PDF listed in the "recents" database associated with the Hancom Office Suite. This database listed the 20 files that were last opened on the phone by the Hancom Office Suite. [redacted].pdf was one of those files. The DFE testified that the recents databased included a "modified" date for each file listed. The modified date indicates when the file was last opened in the Hancom Office Suite. Regarding the [redacted].PDF file, the DFE identified the modified time and date, after a conversion, as 2307 Alaskan time on 08 May 2020. The DFE indicated that this date and time was the last time [redacted].PDF was opened and modified in the Hancom Office Suite.

The DFE's ultimate opinion regarding the [redacted].PDF was that '[redacted].pdf was on the device, it was opened within the Hancom Office Suite, and then a modification occurred and during that procedure the document and the thumbnail were stored within the cache..." In addition, in his expert opinion, the evidence supported that the actual document was stored within the Hancom Office Suite cache. Finally, in his expert opinion, that the document was stored in cache and a thumbnail was created means that

the program was able to fully render the PDF, since if the application did not ever make it visible then there would not be a viewable thumbnail.

The Defense vigorously cross-examined the Government's DFE. He agreed that a user could not access cache; that the [redacted] file was not found in any other location except the cache; that there was no direct evidence that the accused had accessed the [redacted].pdf file; that the recents database did not include other evidence of CSAM; and that there were no chats, texts, or other communications found on the phone suggesting the accused had possessed or distributed CSAM. The DFE, however, did not withdraw or modify his expert opinion concerning the [redacted].pdf file and that it was opened on the device.

The Government's response also referenced the accused's testimony. The Court reviewed his testimony and notes that the accused stated that he had never seen the images found in his cache, that he had never interacted with these images, and that he could not explain how they ended up in the cache on his phone. He further stated that his phone was password protected, that he was the only one who downloaded pornography on his phone, and that no one else had access to the phone, although it's possible his wife may have gained access.

Having reviewed the evidence and arguments of both parties, the Court finds that after viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *See King*, 78 M.J. at 221. The Court agrees with the Defense that the government was required to prove that the accused knowingly possessed the images. The Court also agrees that for images found in the cache, the government typically meets its burden using circumstantial evidence. *See, e.g., King,* 78 MJ at 218 (C.A.A.F. 2019); *United States v. Moss*, 2023 CCA LEXIS 158 (A.F. Ct. Crim. App. 2023); and *United States v. Lyle*, 2022 CCA LEXIS 568 (N-M Ct. Crim. App. 2022). While the Government arguably did not present any direct evidence of the accused's knowledge, there was circumstantial evidence presented supporting the accused's knowing possession, including the image being found in cache, the image being listed in the "recents" database indicating it was opened in the Hancom Office Suite in May 2020; the DFE's expert opinion that the [redacted] file was opened by the Hancom Office Suite of the phone on or about the date charged; and the DFE's opinion that the image was fully rendered, allowing the phone to capture a thumbnail of the image. Further, the accused testified that the phone was password protected, and no one else had access.

The evidence admitted in support of the accused wrongfully possessing the Image 720d image was legally sufficient.

The Defense argues that the evidence admitted at trial concerning possession of Image 720d was legally insufficient because the image did not exist in a location where the accused could access it (i.e. the browser cache); there was no evidence supporting his knowing possession of the image; and there was no evidence supporting his possession of the image on the date charged.

The Government's response again includes reference to the DFE's testimony. The Court reviewed his testimony and notes the following. The DFE testified that Image 720d was found in the sbrowser cache on the phone seized from the accused. The DFE explained that the "sbrowser" is the default internet browser for Android devices and that the sbrowser application may be used to connect and view files on websites on the internet and may also be used to open files or other documents already on the phone. The government's DFE testified that the image being found in the sbrowser cache supported that 720d had been accessed by the browser on the accused's phone in some manner, either through the internet or through local files on the device.

The DFE further testified that an image depicting a young female wearing green shorts was found in the browser cache of the phone seized from the accused. The DFE testified that the young female wearing green shorts appeared to be the same girl wearing green shorts in the video '[redacted] that was charged in Specification 2 of the Charge. The DFE also testified that he found the title of that video [redacted] in the logs/records of the Video LAN Player, which is an application used to view and watch videos on the cell phone. The DFE testified that it would be incredibly unlikely that the image found in the sbrowser cache of the young girl in green shorts did not come from the video [redacted] The same video, [redacted] was downloaded by the Alaskan State Troopers on 18 May 2020 using an IP address associated with the accused's home.

The Government also presented the testimony of a child development expert who testified that Image 720d, Image 85d5, Image 7992, and Image 5628 all appeared to depict the same person, and all appeared to depict the same girl who appeared in both [redacted] videos, who was wearing green shorts. On cross, the expert conceded that the images could be different people but maintained his opinion that he believed they were the same person. He stated it would be "highly unlikely" that the images and videos depicted different people.

Regarding the Defense's argument that the accused did not knowingly possess Image 720d on or about the date charged, the Government argues that the members could have concluded that the girl depicted in Image 720d was the same girl depicted in the [redacted] videos, which were downloaded by the Alaska State Troopers on 18 May 2020 from an IP address registered to the accused's home. Further, the Government argues that, like Image 720d, the other images charged in this case (i.e. those described in Prosecution Exhibits 19 and 20) were all found in the cache of various other applications on the accused's personal cell phone. Further, the images in Prosecution Exhibit 19 had modified and created dates of 18 May 2020. The Government argues that this evidence, in conjunction with the DFE's testimony concerning the image found in the browser cache which he believed came from [redacted] the members could reasonably infer that the accused knowingly possessed Image 720d on or about the date charged.

The government further points to evidence admitted pursuant to M.R.E. 404(b). This evidence included images of young women portrayed as being under the age of 18. The file names of those images used words associated with younger women, including words such as "nubile." The military judge instructed the members that they could use

this evidence for its tendency to prove the accused's intent and motive to knowingly possess images of child pornography.

Finally, the Government's response again referenced the accused's testimony. Again, the accused stated that he had never seen the images found in his cache, that he had never interacted with these images, and that he could not explain how they ended up in the cache on his phone. He further stated that his phone was password protected, that he was the only one who downloaded pornography on his phone, and that no one else had access to the phone, although it's possible his wife may have gained access.

Again, having reviewed the evidence and arguments of both parties, the Court finds that after viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *See King*, 78 M.J. at 221. There was, again, circumstantial evidence presented supporting the accused's knowing possession of Image 720d on or about the charged date. The evidence suggested this image was found in the browser cache of the accused's phone, which he testified was password protected and to which no one else had access. Additionally, the members could reasonably have determined that the girl depicted in Image 720d was the same girl in [redacted] that Image 720d was knowingly possessed on or about 18 March 2020, the date the videos were downloaded and the date corresponding to the "created on" date of other images seized by the Government.

CONCLUSIONS OF LAW

1. The members' question during deliberations did not amount to the announcement of a not guilty finding.
2. The Defense has failed to meet its burden to demonstrate that the members' improperly conducted a reconsideration vote.
3. The evidence admitted at trial supporting the finding that the accused wrongfully possessed the [redacted].pdf image is legally sufficient.
4. The evidence admitted at trial supporting the finding that the accused wrongfully possessed Image 720d is legally sufficient.

RULING

The Defense's motion is DENIED, consistent with the above conclusions of law.

02 August 2023

CRONIN.TIMOTHY.N.[redacted] Digitally signed by CRONIN.TIMOTHY.N.[redacted] Date: 2023.08.02 08:37:06 -04'00'

Timothy N. Cronin
Commander, U.S. Coast Guard
Military Judge

STATEMENT OF TRIAL RESULTS

STATEMENT OF TRIAL RESULTS

SECTION A - ADMINISTRATIVE

1. NAME OF ACCUSED (last, first, MI)	2. BRANCH	3. PAYGRADE	4. DoD ID NUMBER
Kelley, Erick R.	Coast Guard	E-5	[redacted]

5. CONVENING COMMAND	6. TYPE OF COURT-MARTIAL	7. COMPOSITION	8. DATE SENTENCE ADJUDGED
U.S. Coast Guard Pacific Area	General	Enlisted Members	May 21, 2023

SECTION B - FINDINGS

SEE FINDINGS PAGE

SECTION C - ADJUDGED SENTENCE

9. DISCHARGE OR DISMISSAL	10. CONFINEMENT	11. FORFEITURES	12. FINES	13. FINE PENALTY
Dishonorable discharge	12 months	N/A	N/A	N/A

14. REDUCTION	15. DEATH	16. REPRIMAND	17. HARD LABOR	18. RESTRICTION	19. HARD LABOR PERIOD
E-1	Yes ○ No ◉	Yes ○ No ◉	Yes ○ No ◉	Yes ○ No ◉	N/A

20. PERIOD AND LIMITS OF RESTRICTION

N/A

SECTION D - CONFINEMENT CREDIT

21. DAYS OF PRETRIAL CONFINEMENT CREDIT	22. DAYS OF JUDICIALLY ORDERED CREDIT	23. TOTAL DAYS OF CREDIT
0		0 days

SECTION E - PLEA AGREEMENT OR PRE-TRIAL AGREEMENT

24. LIMITATIONS ON PUNISHMENT CONTAINED IN THE PLEA AGREEMENT OR PRE-TRIAL AGREEMENT

There was no plea agreement.

SECTION F - SUSPENSION OR CLEMENCY RECOMMENDATION

25. DID THE MILITARY JUDGE RECOMMEND SUSPENSION OF THE SENTENCE OR CLEMENCY?		26. PORTION TO WHICH IT APPLIES	27. RECOMMENDED DURATION
	Yes ○ No ◉		

28. FACTS SUPPORTING THE SUSPENSION OR CLEMENCY RECOMMENDATION

SECTION G - NOTIFICATIONS

29. Is sex offender registration required in accordance with appendix 4 to enclosure 2 of DoDI 1325.07?	Yes ◉ No ○
30. Is DNA collection and submission required in accordance with 10 U.S.C. § 1565 and DoDI 5505.14?	Yes ◉ No ○
31. Did this case involve a crime of domestic violence as defined in enclosure 2 of DoDI 6400.06?	Yes ○ No ◉
32. Does this case trigger a firearm possession prohibition in accordance with 18 U.S.C. § 922?	Yes ◉ No ○

SECTION H - NOTES AND SIGNATURE

33. NAME OF JUDGE (last, first, MI)	34. BRANCH	35. PAYGRADE	36. DATE SIGNED	38. JUDGE'S SIGNATURE
Cronin, Timothy N.	Coast Guard	O-5	May 21, 2023	CRONIN.TIMOTHY.N. [redacted] Digitally signed by CRONIN.TIMOTHY.N. [redacted] Date: 2023.05.22 01:30:31 -04'00'

37. NOTES

STATEMENT OF TRIAL RESULTS - FINDINGS

SECTION I - LIST OF FINDINGS

CHARGE	ARTICLE	SPECIFICATION	PLEA	FINDING	ORDER OR REGULATION VIOLATED	LIO OR INCHOATE OFFENSE ARTICLE	DIBRS
The Charge:	134	Specification 1:	**Not Guilty**	Guilty			134-B6A
		Offense description	Child pornography: possessing or receiving or viewing				
		Specification 2:	**Not Guilty**	Not Guilty			134R6C
		Offense description	Child pornography: distribution				

CONVENING AUTHORITY'S ACTIONS

POST-TRIAL ACTION

SECTION A - STAFF JUDGE ADVOCATE REVIEW

1. NAME OF ACCUSED (LAST, FIRST, MI)	2. PAYGRADE/RANK	3. DoD ID NUMBER
Kelley, Erick, R	E5	[redacted]

4. UNIT OR ORGANIZATION	5. CURRENT ENLISTMENT	6. TERM
BASE Kodiak	20200116	6 years

7. CONVENING AUTHORITY (UNIT/ORGANIZATION)	8. COURT-MARTIAL TYPE	9. COMPOSITION	10. DATE SENTENCE ADJUDGED
Coast Guard Pacific Area	General	Enlisted Members	21-May-2023

Post-Trial Matters to Consider

11. Has the accused made a request for deferment of reduction in grade?	○ Yes	◉ No
12. Has the accused made a request for deferment of confinement?	○ Yes	◉ No
13. Has the accused made a request for deferment of adjudged forfeitures?	○ Yes	◉ No
14. Has the accused made a request for deferment of automatic forfeitures?	◉ Yes	○ No
15. Has the accused made a request for waiver of automatic forfeitures?	◉ Yes	○ No
16. Has the accused submitted necessary information for transferring forfeitures for benefit of dependents?	○ Yes	◉ No
17. Has the accused submitted matters for convening authority's review?	◉ Yes	○ No
18. Has the victim(s) submitted matters for convening authority's review?	○ Yes	◉ No
19. Has the accused submitted any rebuttal matters?	○ Yes	◉ No
20. Has the military judge made a suspension or clemency recommendation?	○ Yes	◉ No
21. Has the trial counsel made a recommendation to suspend any part of the sentence?	○ Yes	◉ No
22. Did the court-martial sentence the accused to a reprimand issued by the convening authority?	○ Yes	◉ No

23. Summary of Clemency/Deferment Requested by Accused and/or Crime Victim, if applicable.

Accused request: deferral of automatic forfeitures and waiver of all automatic forfeitures of pay and allowances for six months, suspension of reduction in paygrade to E-1 for six months.

SJA advised the Convening Authority may grant the accused clemency IAW RCM 1109 and Art. 60a, UCMJ.

24. Convening Authority Name/Title	25. SJA Name
VADM Andrew J. Tiongson, USCG Commander, Coast Guard Pacific Area	CAPT [redacted] USCG

26. SJA signature	27. Date
[redacted]	05 Jun 2023

SECTION B - CONVENING AUTHORITY ACTION

28. Having reviewed all matters submitted by the accused and the victim(s) pursuant to R.C.M. 1106/1106A, and after being advised by the staff judge advocate or legal officer, I take the following action in this case: [If deferring or waiving any punishment, indicate the date the deferment/waiver will end. Attach signed reprimand if applicable. Indicate what action, if any, taken on suspension recommendation(s) or clemency recommendations from the judge.]

No action on the sentence.

29. Convening authority's written explanation of the reasons for taking action on offenses with mandatory minimum punishments or offenses for which the maximum sentence to confinement that may be adjudged exceeds two years, or offenses where the adjudged sentence includes a punitive discharge (Dismissal, DD, BCD) or confinement for more than six months, or a violation of Art. 120(a) or 120(b) or 120b:

30. Convening Authority's signature	31. Date
[redacted]	06JUN23

32. Date convening authority action was forwarded to PTPD or Review Shop.

ENTRY OF JUDGMENT

SECTION C - ENTRY OF JUDGMENT

****MUST be signed by the Military Judge (or Circuit Military Judge) within 20 days of receipt****

33. **Findings of each charge and specification referred to trial.** [Summary of each charge and specification (include at a minimum the gravamen of the offense), the plea of the accused, the findings or other disposition accounting for any exceptions and substitutions, any modifications made by the convening authority or any post-trial ruling, order, or other determination by the military judge. R.C.M. 1111(b)(1)]

The Charge: Violation of the UCMJ, Article 134, for possession and distribution of child pornography.
Plea: Not Guilty
Finding: Guilty

Specification 1: In that Electronics Technician Second Class Erick R. Kelley, USCGC [redacted] did, on active duty, at or near Kodiak, Alaska, on or about May 18, 2020 knowingly and wrongfully possess child pornography, to wit: eight digital images of a minor, engaging in sexually explicit conduct, and that said conduct was of a nature to bring discredit upon the armed services.

Plea: Not Guilty
Finding: Guilty, except the word eight, of the excepted word, not guilty.

The members also made specific findings regarding the images admitted in support of the charges. The members found the accused guilty of possessing [redacted] pdf and Image 720d and not guilty of possessing Images 85d5, 331, 758, 842, 296, 4283, -4302, -7747, and 1593.

Specification 2: In that Electronics Technician Second Class Erick R. Kelley, USCGC [redacted] did, on active duty, at or near Kodiak, Alaska, on or about May 18, 2020 knowingly and wrongfully distribute child pornography, to wit: two digital videos of a minor engaging in sexually explicit conduct, and that said conduct was of a nature to bring discredit upon the armed services.

Plea: Not Guilty
Finding: Not Guilty

The videos admitted in support of the charges were [redacted] and [redacted]

34. **Sentence to be Entered.** Account for any modifications made by reason of any post-trial action by the convening authority (including any action taken based on a suspension recommendation), confinement credit, or any post-trial rule, order, or other determination by the military judge. R.C.M. 1111(b)(2). If the sentence was determined by a military judge, ensure confinement and fines are segmented as well as if a sentence shall run concurrently or consecutively.

Dishonorable Discharge;

Confinement for twelve (12) months;

Reduction to pay grade E-1.

35. **Deferment and Waiver.** Include the nature of the request, the CA's Action, the effective date of the deferment, and date the deferment ended. For waivers, include the effective date and the length of the waiver. RCM 1111(b)(3)

Accused request: deferral of automatic forfeitures and waiver of all automatic forfeitures of pay and allowances for six months, suspension of reduction in paygrade to E-1 for six months.

The CA took no action on the sentence on 6 June 2023.

36. Action convening authority took on any suspension recommendation from the military judge:

N/A

37. Judge's signature:	38. Date judgment entered:
CRONIN.TIMOTHY.N[redacted] Digitally signed by CRONIN.TIMOTHY.N[redacted] Date: 2023.08.20 18:12:08 -04'00'	20-Aug-2023

39. In accordance with RCM 1111(c)(1), the military judge who entered a judgment may modify the judgment to correct computational or clerical errors within 14 days after the judgment was initially entered. Include any modifications here and resign the Entry of Judgment.

40. Judge's signature:	41. Date judgment entered:

42. Return completed copy of the judgment to the Post-Trial Department/Review Shop for distribution to the defense counsel and/or accused as well as the victim and/or victims' legal counsel.

APPELLATE MOTIONS

IN THE UNITED STATES COAST GUARD
COURT OF CRIMINAL APPEALS

UNITED STATES,
Appellee

v.

Erick R. KELLEY
Electronics Technician
Second Class (E-5)
U.S. Coast Guard,
Appellant

06 February 2025

APPELLANT'S MOTION FOR JUDGE HAVRANEK TO RECUSE, AND IN THE ALTERNATIVE FOR VOIR DIRE OF JUDGE HAVRANEK, CHIEF JUDGE MCCLELLAND, AND JUDGE BRUBAKER THROUGH WRITTEN INTERROGATORIES, FILED 14 JANUARY 2025

CGCMG 0396

DOCKET NO. 1495

ORDER

The Court referred Appellant's recusal motion to Judge Havranek for disposition. Without reaching the merits of the recusal motion, and for reasons unrelated to it, he has requested reassignment of this case only. This is due to his present workload, which is exceptionally high during a period of Presidential transition and high personnel turnover. A new panel will be assigned to replace Judge Havranek for this case.

Accordingly, it is, by the Court, this 6th day of February, 2025,

ORDERED:

That Appellant's motion is denied as moot.

For the Court,
VALDES.SARAH.P[redacted] Digitally signed by VALDES.SARAH.P[redacted] Date: 2025.02.06 12:48:36 -05'00'
Sarah P. Valdes
Clerk of the Court

Copy: Judge Advocate General's Representative
Appellate Government Counsel
Appellate Defense Counsel

IN THE UNITED STATES COAST GUARD
COURT OF CRIMINAL APPEALS

UNITED STATES, Appellee v. Erick R. KELLEY Electronics Technician Second Class (E-5) U.S. Coast Guard, Appellant	10 February 2025 APPELLANT'S MOTION FOR ORAL ARGUMENT, FILED 07 NOVEMBER 2025 CGCMG 0396 DOCKET NO. 1495 ORDER

On consideration of Appellant's Motion for Oral Argument, it is, by the Court, this 10th of February 2025,

ORDERED:

That Appellant's Motion for Oral Argument is hereby granted as to the following issues.

Appellant was acquitted but a finding of guilty was announced.

The members' findings constituted a fatal variance of Specification 1.

The Court will hear argument on **26 March 2025 at 1000** hours. The Oral Argument will take place at the Court of Criminal Appeals Courtroom, [redacted]

For the Court,
VALDES.SARAH.P[redacted]
Digitally signed by VALDES.SARAH.P[redacted]
Date: 2025.02.10 15:18:52 -05'00'
Sarah P. Valdes
Clerk of the Court

Copy: Judge Advocate General's Representative
Appellate Government Counsel
Appellate Defense Counsel

IN THE UNITED STATES
COAST GUARD COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee* v. **Erick R. KELLEY**, Electronics Technician Second Class/E-5 U.S. Coast Guard, *Appellant*	26 February 2024 APPELLANT'S MOTION FOR SECOND ENLARGEMENT OF TIME Docket No. 1495 Case No. CGCMG 0396 Before McClelland, Havranek, Brubaker Tried at Alameda, CA on 15-21 May 2023 before a General Court-Martial convened by Commander, U.S. Coast Guard Pacific Area

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TO THE HONORABLE, THE JUDGES OF THE UNITED STATES COAST GUARD COURT OF CRIMINAL APPEALS

Pursuant to Rule 23.2 of this Court's Rules of Practice and Procedure, Appellant respectfully moves for a thirty-day enlargement of time to file until 3 April 2024. The current due date is 4 March 2024. This is Appellant's second enlargement of time.

There is good cause to grant this motion because of the large size of this Record, comprising of approximately 3,460 pages, including 2,105 transcribed pages, 119 Appellate Exhibits, 29 Prosecution Exhibits, and nine (9) Defense Exhibits. Undersigned counsel requires additional time to complete his review of the Record and to gain access to and examine the sensitive, sealed material pertinent to this case. Additionally, during the first enlargement period, undersigned counsel was preparing for oral argument at the Court of Appeals for the Armed Forces (CAAF) in *United States v. Grijalva*, which occurred on 6 February 2024.

WHEREFORE, Appellant respectfully requests this Court grant this motion for a thirty-day enlargement of time.

Respectfully Submitted,

[redacted]
Schuyler B. Millham
LT, USCG
Appellate Defense Counsel
[redacted]

Certificate of Filing and Service

I certify that a copy of the foregoing was delivered to the Court and opposing counsel via email on 26 February 2024.

[redacted]
Schuyler B. Millham
LT, USCG
Appellate Defense Counsel
[redacted]

IN THE UNITED STATES COAST GUARD
COURT OF CRIMINAL APPEALS

UNITED STATES,
Appellee

v.

Erick R. KELLEY
Electronics Technician
Second Class (E-5)
U.S. Coast Guard,
Appellant

29 February 2024

APPELLANT'S MOTION
FOR SECOND ENLARGEMENT OF
TIME, FILED 26 FEBRUARY 2024

CGCMG 0396

DOCKET NO. 1495

ORDER

On consideration of Appellant's Motion for Second Enlargement of Time to file assignments of error and brief, it is, by the Court, this 29th day of February 2024,

ORDERED:

That Appellant's Motion for Enlargement of Time is hereby granted, up to and including 03 April 2024, as requested by Appellant.

For the Court,
VALDES.SARAH.P.[redacted] Digitally signed by VALDES.SARAH.P.[redacted] Date: 2024.02.29 11:11:53 -05'00'
Sarah P. Valdes
Clerk of the Court

Copy: Judge Advocate General's Representative
Appellate Government Counsel
Appellate Defense Counsel

IN THE UNITED STATES COAST GUARD
COURT OF CRIMINAL APPEALS

UNITED STATES, Appellee v. Erick R. KELLEY Electronics Technician Second Class (E-5) U.S. Coast Guard, Appellant	12 March 2025 APPELLANT'S MOTION FOR ORAL ARGUMENT, FILED 07 NOVEMBER 2025 (TIME CHANGE) CGCMG 0396 DOCKET NO. 1495 ORDER

On consideration of Appellant's Motion for Oral Argument, it is, by the Court, this 12th of March 2025,

ORDERED:

That Appellant's Motion for Oral Argument is hereby granted as to the following issues.

Appellant was acquitted but a finding of guilty was announced.

The members' findings constituted a fatal variance of Specification 1.

The Court will hear argument on **26 March 2025 at 1100** hours. The Oral Argument will take place at the Court of Criminal Appeals Courtroom, [redacted]

For the Court,
VALDES.SARAH.P.[redacted]
Digitally signed by VALDES.SARAH.P.[redacted]
Date: 2025.03.12 09:08:32 -04'00'
Sarah P. Valdes
Clerk of the Court

Copy: Judge Advocate General's Representative
Appellate Government Counsel
Appellate Defense Counsel

IN THE UNITED STATES
COAST GUARD COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee* v. **Erick R. KELLEY**, Electronics Technician Second Class/E-5 U.S. Coast Guard, *Appellant*	25 March 2024 MOTION FOR EXAMINATION OF SEALED MATERIALS Docket No. 1495 Case No. CGCMG 0396 Before McClelland, Havranek, Brubaker Tried at Alameda, CA on 15-21 May 2023 before a General Court-Martial convened by Commander, U.S. Coast Guard Pacific Area

TO THE JUDGES OF THE UNITED STATES
COAST GUARD COURT OF CRIMINAL APPEALS

Pursuant to Rule 23.3 of this Court's Rules of Appellate Procedure, Petty Officer Second Class Erick R. Kelley ("Appellant"), through counsel, respectfully moves this Court to allow for the examination of the following sealed portions of the Record of Trial in this case:

1. Appellate Exhibit XVIII;
2. Appellate Exhibit 58;
3. Appellate Exhibit 68;
4. Prosecution Exhibits 6-7;
5. Prosecution Exhibits 11-16;
6. Prosecution Exhibits 18-20;
7. Prosecution Exhibits 26-28; and
8. Defense Exhibit (A).

Undersigned counsel respectfully requests authorization to examine these sealed materials in the Record of Trial under R.C.M. 1113(b)(3)(B). The examination is reasonably necessary for

the undersigned counsel to properly fulfill his duties and responsibilities under the Coast Guard's Legal Rules of Professional Conduct ("Rules").[1]

Rules 1.1 and 1.3 require the undersigned counsel to provide Appellant competent and diligent representation.[2] The Rules further require attorneys to represent clients thoroughly and do all preparation necessary for the representation.[3] It is reasonably necessary for the proper fulfillment of the undersigned counsel's obligations to Appellant under the Rules to examine the sealed materials in this case.[4] It is reasonably necessary because the Appellate Defense Counsel must review the entire Record of the Trial in order to thoroughly determine if there is any prejudicial error that may have prevented Appellant from receiving a fair trial. All of the materials the undersigned counsel is requesting to examine are critical in determining the factual and legal sufficiency of Appellant's convictions and the adequacy of his trial defense representation.

R.C.M. 1113(b)(4) defines "examination" to include "reading, inspecting, and reviewing." At this time, the undersigned counsel's request is limited to examining all requested materials.

WHEREFORE, Appellant respectfully requests that this Court grant this motion for examination of these sealed materials.

DATE: 25 March 2024

[redacted]Schuyler B. Millham
LT, USCG
Appellate Defense Counsel
[redacted]

[1] COAST GUARD LEGAL RULES OF PROFESSIONAL CONDUCT, COMDTINST M5800.1 (2005).
[2] *See id*.
[3] *Id*., Rule 1.3.
[4] *Id*., Rule 1.1, 1.3.

Certificate of Filing and Service

I certify the foregoing was filed electronically with this Court and that a copy was delivered to opposing counsel via email on 25 March 2024.

[redacted]
Schuyler B. Millham
LT, USCG
Appellate Defense Counsel
[redacted]

IN THE UNITED STATES
COAST GUARD COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee* v. **Erick R. KELLEY**, Electronics Technician Second Class/E-5 U.S. Coast Guard, *Appellant*	27 March 2024 MOTION FOR THIRD ENLARGEMENT OF TIME Docket No. 1495 Case No. CGCMG 0396 Before McClelland, Havranek, Brubaker Tried at Alameda, CA on 15-21 May 2023 before a General Court-Martial convened by Commander, U.S. Coast Guard Pacific Area

TO THE HONORABLE JUDGES OF THE UNITED STATES
COAST GUARD COURT OF CRIMINAL APPEALS

Pursuant to Rule 23.2 of this Court's Rules of Appellate Procedure, Petty Officer Second Class Erick R. Kelley (Appellant), through counsel, respectfully moves for a thirty-day enlargement of time to file matters until 3 May 2024. The current due date is 3 April 2024. This motion marks Appellant's third request for an enlargement of time.

There is good cause to grant this motion. During the second enlargement period, undersigned counsel filed a Reply Brief with this Court in the case of *United States v. Mieres* on 13 March 2024. Additionally, even though undersigned counsel was on pre-approved leave from 16 March to 23 March 2024, he completed reviewing the Record during that time. However, additional time is required to examine the sealed materials in this case.

Counsel filed a motion with this Court on 25 March 2024 to examine the sealed materials in Appellant's case but awaits this Court's order regarding that motion. If granted, undersigned counsel will need additional time to review the sealed documents and, if necessary, take appropriate actions. Due to the sensitive nature of these documents and the severity of the

conviction, undersigned counsel also anticipates needing time to consult supervisory counsel during the review and analysis of the sealed materials.

WHEREFORE, Appellant respectfully requests that this Court grant this motion for a thirty-day enlargement of time.

DATE: 27 March 2024

[redacted]
Schuyler B. Millham
LT, USCG
Appellate Defense Counsel
[redacted]

Certificate of Filing and Service

I certify the foregoing was filed electronically with this Court and that a copy was delivered to opposing counsel via email on 27 March 2024.

[redacted]
Schuyler B. Millham
LT, USCG
Appellate Defense Counsel
[redacted]

IN THE UNITED STATES COAST GUARD
COURT OF CRIMINAL APPEALS

UNITED STATES,
Appellee

v.

Erick R. KELLEY
Electronics Technician
Second Class (E-5)
U.S. Coast Guard,
Appellant

28 March 2024

APPELLANT'S MOTION FOR EXAMINATION OF SEALED MATERIALS, FILED 25 MARCH 2024

CGCMG 0396

DOCKET NO. 1495

ORDER

On consideration of Appellant's Motion for Examination of Sealed Material, it is, by the Court, this 28th day of March, 2024,

ORDERED:

That Appellant's Motion is hereby granted. Counsel may coordinate with Coast Guard Investigative Service to examine the requested sealed materials.

For the Court,
VALDES.SARAH.P[redacted] Digitally signed by VALDES.SARAH.P[redacted] Date: 2024.03.28 11:09:54 -04'00'
Sarah P. Valdes
Clerk of the Court

Copy: Judge Advocate General's Representative
Appellate Government Counsel
Appellate Defense Counsel

IN THE UNITED STATES COAST GUARD
COURT OF CRIMINAL APPEALS

UNITED STATES,
Appellee

v.

Erick R. KELLEY
Electronics Technician
Second Class (E-5)
U.S. Coast Guard,
Appellant

01 April 2024

APPELLANT'S MOTION
FOR THIRD ENLARGEMENT OF
TIME, FILED 27 MARCH 2024

CGCMG 0396

DOCKET NO. 1495

ORDER

On consideration of Appellant's Motion for Third Enlargement of Time to file assignments of error and brief, it is, by the Court, this 1st day of April, 2024,

ORDERED:

That Appellant's Motion for Enlargement of Time is hereby granted, up to and including 03 May 2024, as requested by Appellant.

For the Court,

VALDES.SARAH.P.[redacted] Digitally signed by VALDES.SARAH.P.[redacted] Date: 2024.04.01 10:43:30 -04'00'

Sarah P. Valdes
Clerk of the Court

Copy: Judge Advocate General's Representative
Appellate Government Counsel
Appellate Defense Counsel

IN THE UNITED STATES COAST GUARD
COURT OF CRIMINAL APPEALS

UNITED STATES, Appellee v. Erick R. KELLEY Electronics Technician Second Class (E-5) U.S. Coast Guard, Appellant	2 May 2024 APPELLANT'S MOTION FOR FOURTH ENLARGEMENT OF TIME, FILED 26 APRIL 2024 CGCMG 0396 DOCKET NO. 1495 ORDER

On consideration of Appellant's Motion for Fourth Enlargement of Time to file assignments of error and brief, it is, by the Court, this 2nd day of May, 2024,

ORDERED:

That Appellant's Motion for Enlargement of Time is hereby granted, up to and including 03 June 2024, as requested by Appellant.

For the Court,
MCCLELLAND.L[redacted] Digitally signed by MCCLELLAND.LANE.I[redacted]
ANE.I.[redacted] Date: 2024.05.02 11:17:15 -04'00'
L. I. McClelland
Chief Judge

Copy: Judge Advocate General's Representative
Appellate Government Counsel
Appellate Defense Counsel

IN THE UNITED STATES COAST GUARD
COURT OF CRIMINAL APPEALS

UNITED STATES,
Appellee

v.

Erick R. KELLEY
Electronics Technician
Second Class (E-5)
U.S. Coast Guard,
Appellant

30 May 2024

APPELLANT'S MOTION
FOR FIFTH ENLARGEMENT OF
TIME, FILED 24 MAY 2024

CGCMG 0396

DOCKET NO. 1495

ORDER

On consideration of Appellant's Motion for Fifth Enlargement of Time to file assignments of error and brief, it is, by the Court, this 30th day of May, 2024,

ORDERED:

That Appellant's Motion for Enlargement of Time is hereby granted, up to and including 03 July 2024, as requested by Appellant. No further enlargements will be granted absent extraordinary circumstances.

For the Court,
VALDES.SARAH.P. [redacted] Digitally signed by VALDES.SARAH.P [redacted] Date: 2024.05.30 08:50:34 -04'00'
rah. P . Valdes
Clerk of the Court

Copy: Judge Advocate General's Representative
Appellate Government Counsel
Appellate Defense Counsel

IN THE UNITED STATES
COAST GUARD COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee* v. **Erick R. KELLEY**, Electronics Technician Second Class/E-5 U.S. Coast Guard, *Appellant*	20 June 2024 MOTION FOR EXAMINATION OF SEALED MATERIALS Docket No. 1495 Case No. CGCMG 0396 Before McClelland, Havranek, Brubaker Tried at Alameda, CA on 15-21 May 2023 before a General Court-Martial convened by Commander, U.S. Coast Guard Pacific Area

TO THE JUDGES OF THE UNITED STATES
COAST GUARD COURT OF CRIMINAL APPEALS

Pursuant to Rule 23.3 of this Court's Rules of Appellate Procedure, Petty Officer Second Class Erick R. Kelley ("Appellant"), through counsel, respectfully moves this Court to allow for the examination of the following sealed portions of the Record of Trial in this case:

1. Appellate Exhibit XVIII;
2. Appellate Exhibit 58;
3. Appellate Exhibit 68;
4. Prosecution Exhibits 6-7;
5. Prosecution Exhibits 11-16;
6. Prosecution Exhibits 18-20;
7. Prosecution Exhibits 26-28; and
8. Defense Exhibit (A).

Undersigned counsel respectfully requests authorization to examine these sealed materials in the Record of Trial under R.C.M. 1113(b)(3)(B). The examination is reasonably necessary for

the undersigned counsel to properly fulfill his duties and responsibilities under the Coast Guard's Legal Rules of Professional Conduct ("Rules").[1]

Rules 1.1 and 1.3 require the undersigned counsel to provide Appellant competent and diligent representation.[2] The Rules further require attorneys to represent clients thoroughly and do all preparation necessary for the representation.[3] It is reasonably necessary for the proper fulfillment of the undersigned counsel's obligations to Appellant under the Rules to examine the sealed materials in this case.[4] It is reasonably necessary because the Appellate Defense Counsel must review the entire Record of the Trial in order to thoroughly determine if there is any prejudicial error that may have prevented Appellant from receiving a fair trial. All of the materials the undersigned counsel is requesting to examine are critical in determining the factual and legal sufficiency of Appellant's convictions and the adequacy of his trial defense representation.

R.C.M. 1113(b)(4) defines "examination" to include "reading, inspecting, and reviewing." At this time, the undersigned counsel's request is limited to examining all requested materials.

WHEREFORE, Appellant respectfully requests that this Court grant this motion for examination of these sealed materials.

DATE: 20 June 2024

POPE.THADEUS.JAC[redacted]
KSON.[redacted]
Digitally signed by POPE.THADEUS.JACKSON[redacted]
Date: 2024.06.20 16:01:19 -04'00'

Thad J. Pope
LCDR, USCG
Appellate Defense Counsel
[redacted]

[1] COAST GUARD LEGAL RULES OF PROFESSIONAL CONDUCT, COMDTINST M5800.1 (2005).
[2] *See id*.
[3] *Id*., Rule 1.3.
[4] *Id*., Rule 1.1, 1.3.

Certificate of Filing and Service

I certify the foregoing was filed electronically with this Court and that a copy was delivered to opposing counsel via email on 20 June 2024.

POPE.THADEUS.JACKSON [redacted] Digitally signed by POPE.THADEUS.JACKSON [redacted] Date: 2024.06.20 16:01:49 -04'00'

Thad J. Pope
LCDR, USCG
Appellate Defense Counsel
[redacted]

555IN THE UNITED STATES
COAST GUARD COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee* v. **Erick R. KELLEY**, Electronics Technician Second Class/E-5 U.S. Coast Guard, *Appellant*	03 JULY 2024 APPELLANT'S ASSIGNMENTS OF ERROR Docket No. 1495 Case No. CGCMG 0396 Before McClelland, Havranek, Brubaker Tried at Alameda, CA on 15-21 May 2023 before a General Court-Martial convened by Commander, U.S. Coast Guard Pacific Area

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TO THE HONORABLE JUDGES OF THE UNITED STATES
COAST GUARD COURT OF CRIMINAL APPEALS

Thad J. Pope
LCDR, USCG
Appellate Defense Counsel
[redacted]

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U.S. Supreme Court

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Rules for Courts-Martial

Issues

I.

WHETHER APPELLANT WAS ACQUITTED.

II.

WHETHER APPELLANT WAS DEPRIVED OF DUE PROCESS WHEN HE WAS CONVICTED OF OFFENSES DIFFERENT FROM: THOSE CHARGED WITH SPECIFICATION 1, THOSE THAT SERVED AS THE BASIS FOR THE ARTICLE 32 PRELIMINARY HEARING AND THE PRELIMINARY HEARING OFFICER'S PROBABLE CAUSE DETERMINATION, AND THOSE THAT SERVED AS THE BASIS FOR THE ARTICLE 34 ADVICE AND REFERRAL.

III.

WHETHER THE COURT-MARTIAL LACKED JURISDICTION BECAUSE THE MILITARY JUDGE ERRONEOUSLY INSTRUCTED THE MEMBERS ON ADDITIONAL OFFENSES TO BE CONSIDERED AS PART OF SPECIFICATION 1 AFTER REFERRAL, OVER DEFENSE OBJECTIONS, WITHOUT WITHDRAWING, PREFERRAL ANEW, AND WITHOUT SUBSEQUENT REFERRAL, AS REQUIRED BY R.C.M. 603.

IV.

WHETHER THE MEMBERS' FINDINGS CONSTITUTED A FATAL VARIANCE OF SPECIFICATION 1.

V.

WHETHER THE MILITARY JUDGE ERRONEOUSLY FAILED TO CONDUCT A PROPER INQUIRY INTO THE PANEL MEMBERS' QUESTIONS (CLARIFYING THAT THEY ACQUITTED AFTER THEIR INITIAL VOTE ON BOTH SPECIFICATIONS), AND IMPROPERLY INSTRUCTED THE MEMBERS REGARDING VOTING PROCEDURES.

VI.

WHETHER APPELLANT RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS COUNSEL FAILED TO CLEARLY ASSERT AND MAINTAIN OBJECTIONS TO THE MILITARY JUDGE'S ERRONEOUS INSTRUCTIONS TO THE PANEL, AND TO THE MILITARY JUDGE ALLOWING ADDITIONAL OFFENSES TO BE CONSIDERED AS PART OF SPECIFICATION 1.

VII.

WHETHER THE EVIDENCE IN SPECIFICATION 1 OF THE CHARGE WAS LEGALLY AND FACTUALLY SUFFICIENT.

Statement of Statutory Jurisdiction

This case is within this Court's jurisdiction under Article 66(b)(3), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866, because Appellant received an approved court-martial sentence that includes a dishonorable discharge.

Statement of the Case

On 21 May 2023, consistent with his pleas, Appellant was acquitted of one specification of wrongfully distributing child pornography videos.[1] Contrary to his pleas, and in conflict with the panel's initial decision, a general-court martial convicted Appellant of one specification of knowingly and wrongfully possessing child pornography in violation of Article 134, UCMJ.[2] The Military Judge sentenced him to twelve months' confinement, reduction to E-1, and a dishonorable discharge (DD).[3]

[1] Statement of Trial Results at 2.
[2] Statement of Trial Results at 2; 10 U.S.C. § 920c.
[3] Statement of Trial Results at 1.

Introduction

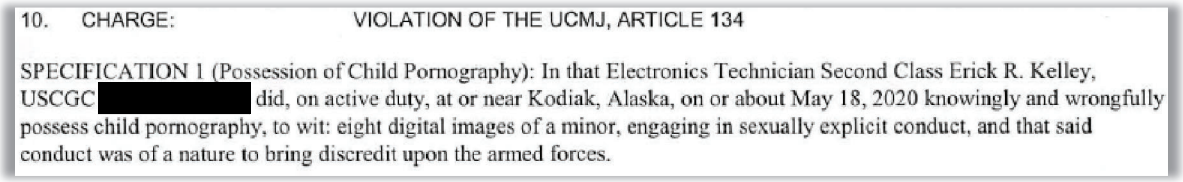
Appellant faced offenses at trial which he was never charged with committing. Upon deliberation, he was initially acquitted of The Charge and both Specifications. Then, after additional judicial error, the panel voted again and convicted Appellant of wrongfully possessing two images of child pornography which were never part of the charged misconduct. Simultaneously, Appellant was acquitted of all charged offenses, and of possessing two additional uncharged images.

Statement of the Facts

Facts Relevant to Issues II-IV, VI (Due Process, Added offenses to Spec. 1, Variance, related IAC)

A. The Government charged Appellant with possessing eight images under Specification 1, not eleven as shown on the Findings Worksheet. The Charge was never withdrawn, amended, re-preferred, or referred anew.

In Specification 1 of the Charge, Appellant was charged with knowingly and wrongfully possessing eight images of child pornography: [4]



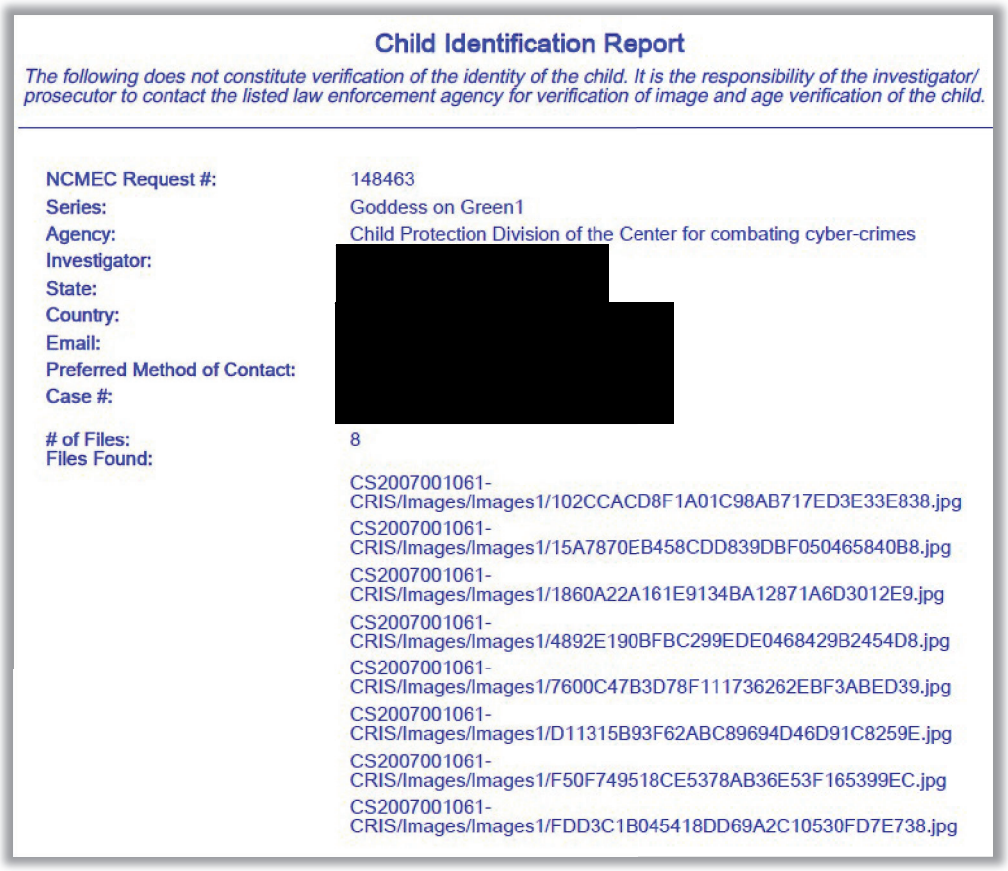
10. CHARGE: VIOLATION OF THE UCMJ, ARTICLE 134

SPECIFICATION 1 (Possession of Child Pornography): In that Electronics Technician Second Class Erick R. Kelley, USCGC [redacted] did, on active duty, at or near Kodiak, Alaska, on or about May 18, 2020 knowingly and wrongfully possess child pornography, to wit: eight digital images of a minor, engaging in sexually explicit conduct, and that said conduct was of a nature to bring discredit upon the armed forces.

The charge sheet did not specify or describe these eight images, and no Bill of Particulars was ever issued. However, these eight images were specifically identified during the Article 32, UCMJ, preliminary hearing held on 17 May 2022.[5] During the preliminary hearing, the Government clarified, "for purposes of this ROI, the images at issue will be the images found on pages three of

[4] Charge Sheet.
[5] Art. 32 Report at 1.

four of the [Child Identification Report provided by NCMEC]" (excerpted below), and that "*these are the eight images that are subject to Specification 1 of this charge*."[6]



Child Identification Report

The following does not constitute verification of the identity of the child. It is the responsibility of the investigator/ prosecutor to contact the listed law enforcement agency for verification of image and age verification of the child.

NCMEC Request #:	148463
Series:	Goddess on Green1
Agency:	Child Protection Division of the Center for combating cyber-crimes
Investigator:	[redacted]
State:	
Country:	
Email:	
Preferred Method of Contact:	
Case #:	
# of Files:	8
Files Found:	CS2007001061-CRIS/Images/Images1/102CCACD8F1A01C98AB717ED3E33E838.jpg CS2007001061-CRIS/Images/Images1/15A7870EB458CDD839DBF050465840B8.jpg CS2007001061-CRIS/Images/Images1/1860A22A161E9134BA12871A6D3012E9.jpg CS2007001061-CRIS/Images/Images1/4892E190BFBC299EDE0468429B2454D8.jpg CS2007001061-CRIS/Images/Images1/7600C47B3D78F111736262EBF3ABED39.jpg CS2007001061-CRIS/Images/Images1/D11315B93F62ABC89694D46D91C8259E.jpg CS2007001061-CRIS/Images/Images1/F50F749518CE5378AB36E53F165399EC.jpg CS2007001061-CRIS/Images/Images1/FDD3C1B045418DD69A2C10530FD7E738.jpg

[7]

The Preliminary Hearing Officer (PHO) considered evidence that CGIS' Electronic Crimes Section and DHS' Cyber Crimes Center analyzed in conjunction with the National Center for Missing and Exploited Children (NCMEC).[8] This examination "yielded positive matches for nine images identified with known child victims."[9] The PHO noted that some of the data included duplicates and the possibility of other potential defenses.[10] Nonetheless, the PHO found probable cause for Specification 1, and noted that "Government Exhibit 13 of enclosure (2) includes the

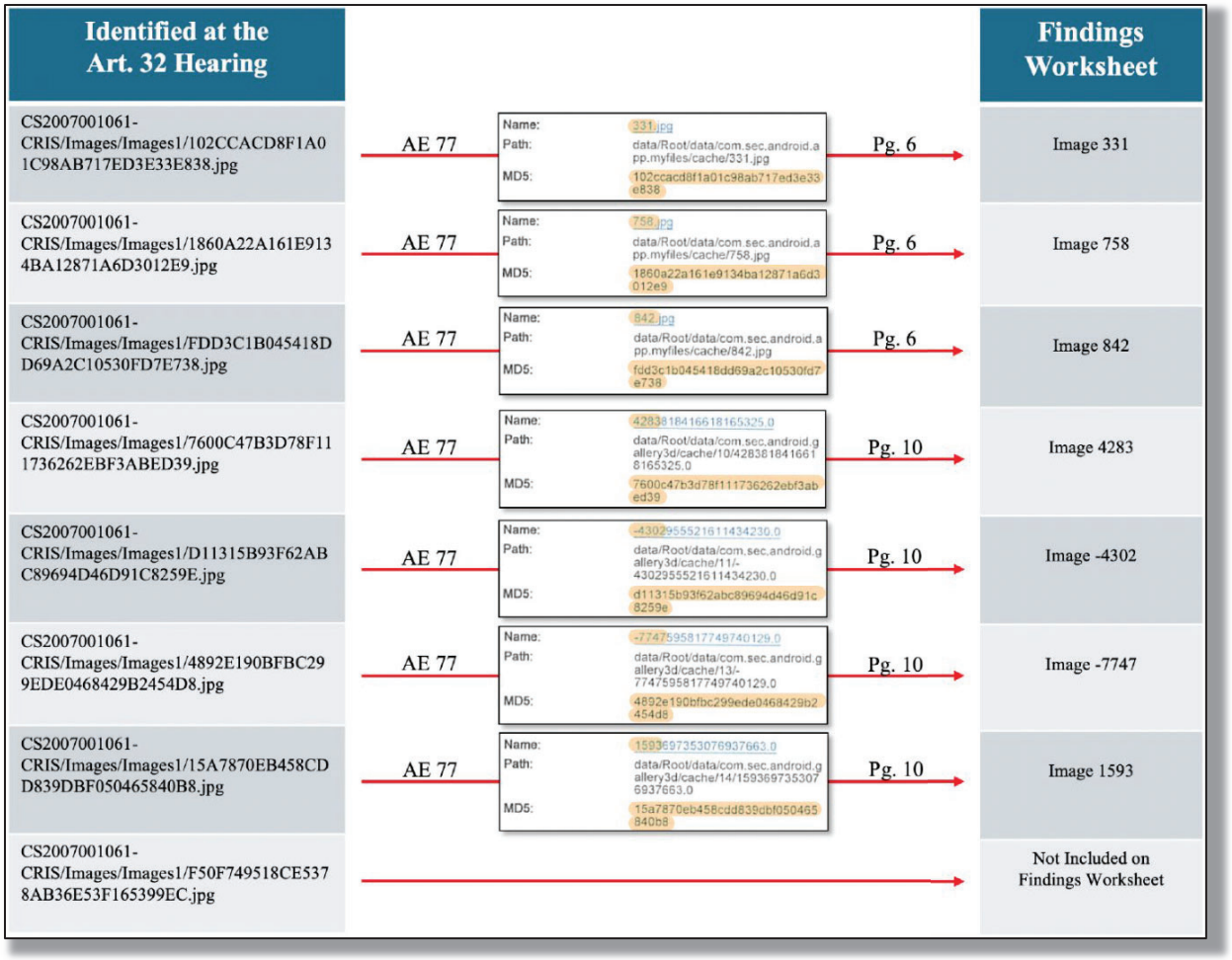
[6] Audio Recording of Art. 32 Preliminary Hearing at timestamp 26:14-26:35 (emphasis added).
[7] Art. 32 Report, Ex. 13 of encl. (2) at 5 (Bates No. 000021).
[8] Art. 32 Report at 2.
[9] Art. 32 Report at 3.
[10] Art. 32 Report at 2.

Child Identification Report provided by NCMEC. This report yielded *eight* files *associated with entitled series "Goddess of the Green 1*."[11]

Government Exhibit 13 of Enclosure (2) to the Article 32 Report reveals the file names of these eight images.[12] Only seven of the original eight noticed images were included on the Findings Worksheet,[13] and four uncharged images were added.[14] This resulted in eleven named images on the Findings Worksheet. The Court can determine which of the original eight images noticed at the Article 32 were ultimately listed on the Findings Worksheet[15] by cross-referencing those documents with App. Ex. 77,[16] and Pros. Ex. 29.[17]

Undersigned counsel compiled a diagram below, linking the naming conventions used in the Findings Worksheet with those that the Government noticed by during the Article 32 preliminary hearing and in the Preliminary Hearing Officer's report.[18] The page numbers on the right hand side of the diagram reference pages of App. Ex. 77.

[11] Art. 32 Report at 4 (emphasis added).
[12] Art. 32 Report, Ex. 13 of encl. (2) at 5.
[13] These included: Image 331, Image 758, Image 842, Image 4283, Image 4302, Image 7747, and Image 1593. These images constituted items 4, 5, 6, 8, 9, 10, and 11 on the Findings Worksheet (App. Ex. 105 at 3). The Record is unclear as to why eight were charged, but only seven of those were listed on the Findings Worksheet.
[14] These included: Hebes.pdf (convicted), Image 720d (convicted), Image 85d5, and Image 296. These images constituted items 1, 2, 3, and 7 on the Findings Worksheet (App. Ex. 105 at 3).
[15] App. Ex. 105 at 3 (Findings Worksheet).
[16] App. Ex. 77 (Redacted version of Pros. Ex. 18, 19, 20 – see file names listed in File Info).
[17] Pros. Ex. 29 (Image Index); *see also*, R. at 19 (Art. 39(a) session of 15 May 2023 (wherein the Military Judge describes that the Government's Image Index in Pros. Ex. 29 reflects the file names that appear on the compact discs provided in the sealed Prosecution Exhibits).
[18] Art. 32 Report, Ex. 13 of encl. (2) at 5.



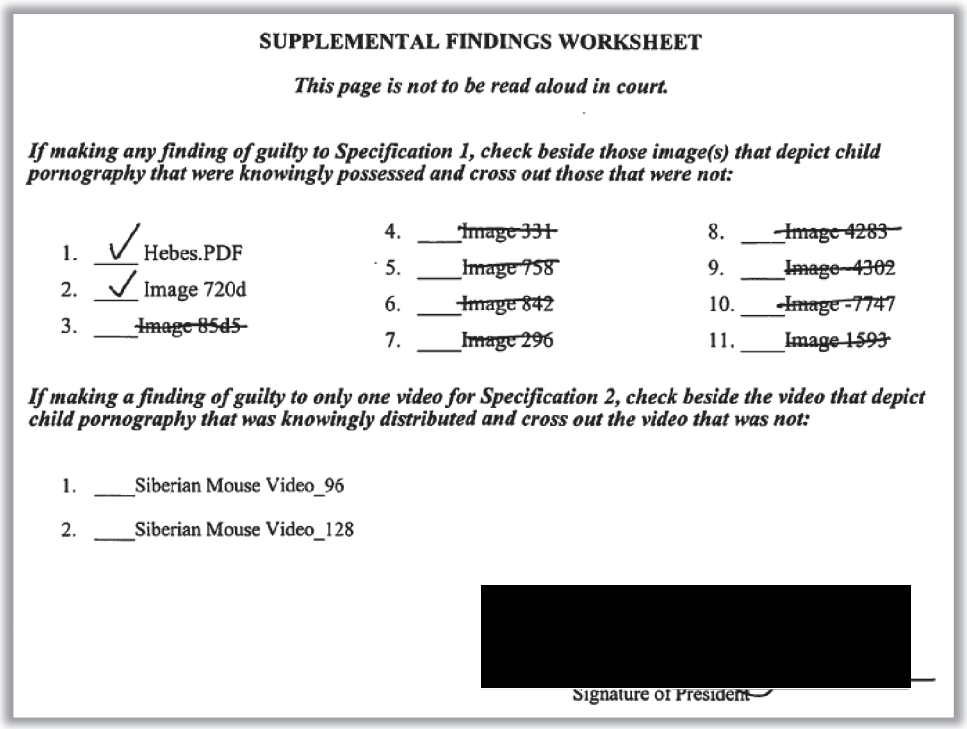
The Hebes PDF file, one of the four uncharged images, contained as many as eight additional images of child pornography within a collage of images.[19] Eight uncharged images from the Hebes PDF collage (generally referred to as one image or PDF throughout this brief since it was identified as one image on the Findings Worksheet), plus the three other uncharged images on the Findings Worksheet equals eleven uncharged images that went to the members for findings. The other seven charged images were also on the worksheet, making a total of eighteen images that the members considered for Specification 1.

[19] The Hebes.pdf includes a collage of nine different images, eight of which could depict child pornography. One of those nine images depicts a child who is fully clothed and not engaging in sexual conduct. The members did not make specific findings with respect to the Hebes.pdf file as to which image or images in the collage constituted child pornography.

The Charge Sheet was never amended to account for the addition of four images which were ultimately added to the Findings Worksheet. The Article 34, UCMJ, advice did not discuss which images or files were charged but referenced the Article 32 Report, which again cited the eight images that the Government initially identified.[20] The Convening Authority referred the original, unamended Charge and two specifications,[21] and the Appellant was arraigned on this same Charge and Specifications.[22] Because the Charge Sheet was never amended, the additional offenses were never referred.

The two images for which Appellant was convicted of possessing[23] were not listed on the Child Identification Report (CIR), not among the original eight identified by the PHO, and not noticed by the Government as constituting the possession offense under Specification 1.[24] To the contrary, although never added to the Charge Sheet, they were added to the court-martial offenses when Government Counsel was permitted by the Military Judge to merely add them to the Findings Worksheet. While Appellant was acquitted of all charged offenses, as well as two additional non-charged offenses ("Image 85d5" and "Image 296"), he was eventually convicted of possessing the "Hebes.PDF" and "Image 720d," offenses that were added via the Findings Worksheet.[25]

[20] Staff Judge Advocate's Pre-Trial Advice Under Article 34, UCMJ.
[21] Charge Sheet at 2.
[22] R. at 3 (Art. 39(a) of 21 July 2022).
[23] Convening Authority's Action; EOJ at 3; Appellate Ex. 105 at 3 (Findings Worksheet).
[24] Art. 32 Report, Ex. 13 of encl. (2) at 5; Audio Recording of Art. 32 Preliminary Hearing at timestamp 26:14-26:35.
[25] Convening Authority's Action; EOJ at 3; Appellate Ex. 105 at 3 (Findings Worksheet). The findings worksheet listed eleven images.



SUPPLEMENTAL FINDINGS WORKSHEET

This page is not to be read aloud in court.

If making any finding of guilty to Specification 1, check beside those image(s) that depict child pornography that were knowingly possessed and cross out those that were not:

1. ✓ Hebes.PDF
2. ✓ Image 720d
3. ~~Image 85d5~~
4. ~~Image 331~~
5. ~~Image 758~~
6. ~~Image 842~~
7. ~~Image 296~~
8. ~~Image 4283~~
9. ~~Image 4302~~
10. ~~Image 7747~~
11. ~~Image 1593~~

If making a finding of guilty to only one video for Specification 2, check beside the video that depict child pornography that was knowingly distributed and cross out the video that was not:

1. Siberian Mouse Video_96
2. Siberian Mouse Video_128

[redacted]

~~Signature of President~~

[26]

Although the admissibility of the additional images was litigated from an evidentiary standpoint, confusion persisted during and after trial as to whether the images were admitted (1) as MRE 404(b) evidence; (2) as evidence of the charged crime (*res gestae* of the original eight noticed images); or (3) improperly as evidence of new, uncharged and unreferred offenses (possession of the images added to the Findings Worksheet).

When the Government filed notice on 8 August 2022 regarding M.R.E. 404(b) evidence it intended to use at trial, it not only put the defense on notice regarding potential MRE 404(b) evidence, it further established what images had been charged and what images had not been charged.[27] Specifically, by identifying a ".pdf file" as an image it proposed to use under MRE 404(b), the Government explicitly stated that this file was not included as one of the charged

[26] App. Ex. 105 at 3 (Findings Worksheet).
[27] App. Ex. XIV (Def. Motion to Exclude MRE 404(b)) (the Government erroneously dated this memo 2021 instead of 2022).

images/offenses.[28] Because it was *uncharged* misconduct, the Government gave notice that it wanted to use this image in support of proving Appellant was guilty of possessing one of the eight *charged* images.

Trial Defense Counsel objected to the Government's initial M.R.E. 404(b) notice in their Motion to Exclude evidence under M.R.E. 404(b) of 28 September 2022.[29] In their motion, the Defense argued that the Government failed to articulate a proper non-propensity use for this evidence, and that they simply listed all M.R.E. 404(b) exceptions. The Government provided an updated notice on 11 October 2022 with its intended uses of the evidence under M.R.E. 404(b).[30] The Defense provided a supplement to its motion to exclude MRE 404(b), providing an affidavit from Appellant, and arguing that the Government's notice fails the *Reynolds* prong requiring an M.R.E. 403 balancing test.[31]

On 13 December 2022, the Government provided an updated MRE 404(b) notice[32] to the Defense of the additional images, including "Hebes.pdf,"[33] and Image "720d."[34] On the one hand, the Government noted that the Court can offset potential prejudice under *Reynolds'* M.R.E. 403 balancing using limiting instructions "*to ensure that the 'other acts' evidence is not improperly*

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[28] Although the Government does not include a specific name for this file until its 13 Dec 22 response, labeling it "Hebes", it is clear that the reference to this pdf file in the initial notice and second, 11 Oct 22 notice, is to the same file.
[29] App. Ex. XIV (Def. Motion to Exclude MRE 404(b)).
[30] App. Ex. XV (Gov. Resp. to Def. Updated 404(b) Notice).
[31] *United States v. Reynolds,* 29 M.J. 105 (C.M.A. 1989); App. Ex. XVI (Def. Supp. Mot. To Exclude MRE 404(b) with Accused's Affidavit).
[32] App. Ex. XVII at 6-9 (Gov. Resp. to Def. Motion to Exclude MRE 404(b) (see also, Enclosures 4, 11 – Sealed).
[33] App. Ex. 111 at 6 (Gov. Resp. to Def. Post-Trial Motion for Appropriate Relief, 14 July 2023) (found in the cache of the Hanscom Office Suite application on the Android cell phone).
[34] App. Ex. 111 at 6 (Gov. Resp. to Def. Post-Trial Motion for Appropriate Relief, 14 July 2023) (found in the internet browser cache on the Android cell phone).

used by the fact-finder."[35] On the other hand, it is in this December 2022 response where the Government provides the first glimpse of its new theory that it can use "Image 720d" and the Hebes PDF and other images for purposes beyond MRE 404(b):

> Images of Child Erotica and other Child Sexual Abuse Material found on the Accused's Phone.4 See Enclosure 11. Over forty images/files found in the cache of the Accused's personal cell phone that contain pre-pubescent children in various scenes, these images include child sexual abuse material, images within the same file series as the charged CSAM, and images used to prove the charged offenses. The images show children in various unnatural, suggestive positions, and that would be identified as child erotica. Many of these images were also identified through Homeland Security Investigations (HSI) database as associated with verified series of child pornography. Due to all the images being found in the same location within the Accused's phone, the significant number of images that have the same young girl in the videos related to one of the charged offenses, and the number of images makes this evidence so closely intertwined with the charged offenses as to be "part and parcel" of both offenses. Therefore, the Government believes this evidence is *res gestae*. In addition, as stated in *Metz*, this evidence will assist the factfinder by providing context to the evidence and alleviate any confusion.

[36]

The Government's explanation for Hebes PDF hints at even more uses for this evidence:[37]

> The Hebes.pdf, in addition to the list of search terms and file names, contains 9 images of child erotica and child sexual abuse at the top of the document, this evidence is res gestae. This evidence is intrinsic and directly helps prove Charge l. The Accused is charged with possession of 'eight digital images of a minor, engaging in sexually explicit conduct.' **It is the Government's theory that many of those images on the top of the Hebes.pdf meet the legal definition of child pornography and are considered part of the charged offense, and therefore is res gestae.**[38]

While neither clear from this entry nor the motions session discussed below, this is the first clue that contrary to Constitutional protections, Rules for Courts-Martial, MREs, case law and established practice, the Government believed it had discovered a new way to add uncharged

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[35] App. Ex. XVII (Gov. Resp. to Def. Supp. to Mot. to Exclude MRE 404(b)) (emphasis added).
[36] App. Ex. XVII at 9 (Gov. Resp. to Def. Motion to Exclude MRE 404(b) (see Enclosure 11 – Sealed).
[37] App. Ex. XVII at 6 (Gov. Resp. to Def. Motion to Exclude MRE 404(b) (see Enclosure 4 – Sealed).
[38] App. Ex. XVII at 6 (emphasis added) (Gov. Resp. to Def. Supp. to Mot. to Exclude MRE 404(b)); *see also*, AE-XVII at 9-11, where the Government argues the Phone applications (Tor, FrostWire) are also *res gestae*, or alternatively admissible under M.R.E. 404(b).

misconduct as an additional offense to referred charges and could do so without even having to amend a Charge Sheet—by calling it "*res gestae*."[39]

At trial, the Government essentially proposed that because Hebes PDF meets the "legal definition of child pornography," in the Trial Counsel's opinion, and because the Appellant has been charged with possession of child pornography, the Trial Counsel can, *sua sponte*, add this to the case as a charged offense. There is no discussion on the record about how the Trial Counsel can add additional offenses without amending the charge sheet, let alone whether this would be a minor or major change under Rule for Courts-Martial 603. There is no discussion about how the Trial Counsel can add alleged misconduct without preferring additional offenses, serving as accuser, conducting an Article 32 hearing, providing Article 34 advice, referring, and then arraigning Appellant on additional offenses. The Defense did not intentionally relinquish or abandon any of these due process rights, nor was there a colloquy between the Military Judge and Appellant discussing such a waiver.

To the contrary, when the Military Judge held an Article 39(a) motions session on 20 December 2022 to litigate Trial Defense Counsel's Motion to Exclude this noticed M.R.E. 404(b) evidence, none of these fundamental issues were fully identified or discussed. Throughout that hearing, Civilian Defense Counsel discussed the "*eight images* [from the "Goddess of the Green series"[40]] that [Special Agent C.C.] discussed at the Article 32 *that <u>are</u> the charged images, in this case*."[41] Civilian Defense Counsel distinguished the M.R.E. 404(b) evidence as "one of those

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[39] *United States v. St. Jean*, 83 M.J. 109, 112 (C.A.A.F. 2023) (defining *res gestae* "as '[t]he events at issue, or other events contemporaneous with them," and citing *Black's Law Dictionary* 1565 (11th ed. 2019)).

[40] R. at 49 (Art. 39(a) of 20 Dec 2022 with oral argument on the Defense's motion to exclude M.R.E. 404(b) evidence).

[41] R. at 43-49 (Art. 39(a) of 20 Dec 2022 with oral argument on the Defense's motion to exclude M.R.E. 404(b) evidence) (emphasis added).

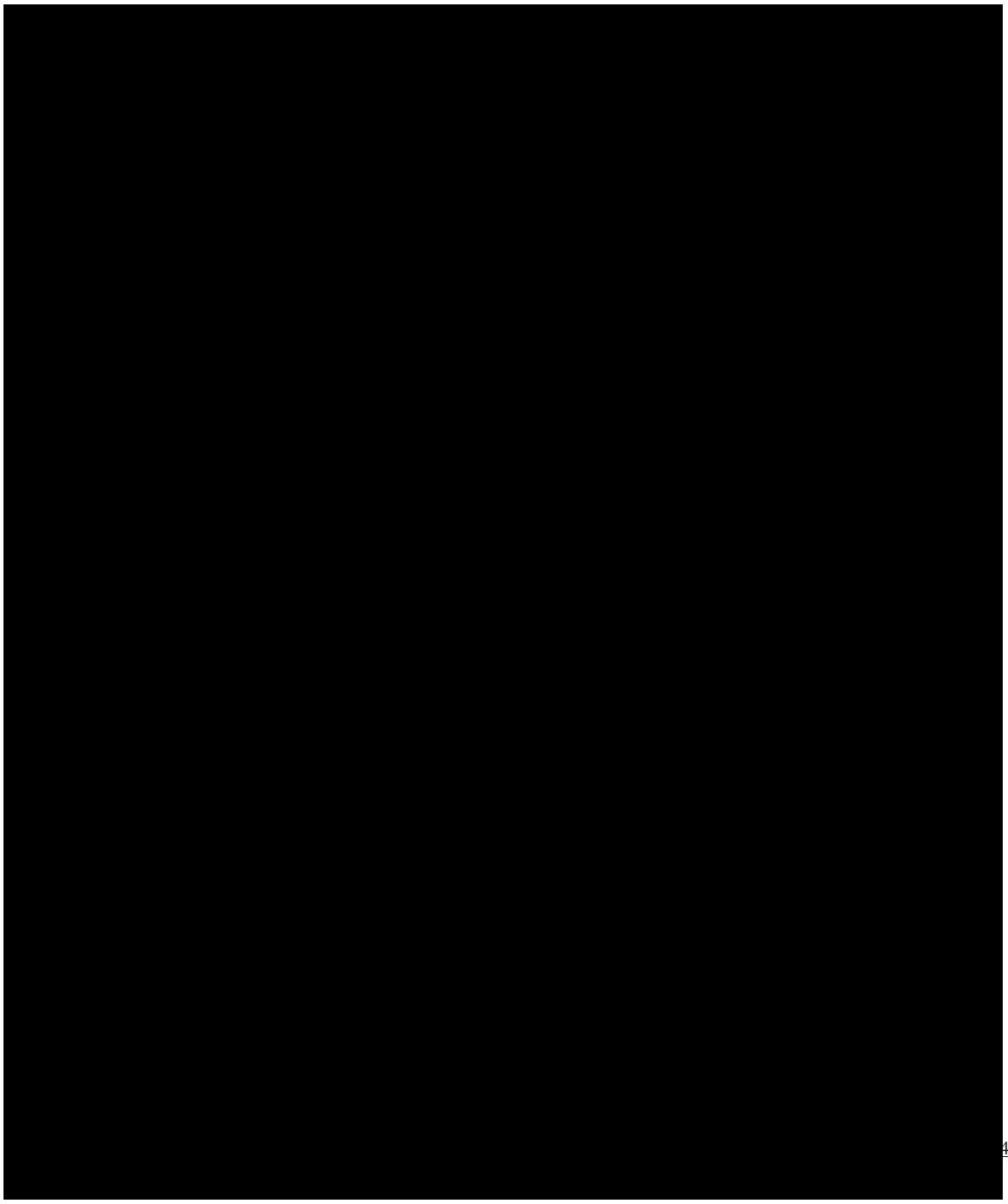
things that's *not the charged image*" when referring to the Hebes PDF file.[42] Civilian Defense Counsel articulated his objections to the Government's potential additional use of the M.R.E 404(b) evidence when he said:

[Continued below]

[42] R. at 44, 61 (Art. 39(a) of 20 Dec 2022) (emphasis added).

[redacted][43]

[43] R. at 105 (Art. 39(a) of 20 Dec 2022).

 [44]

Shortly thereafter, the Government articulated its argument as to why the PDF and other evidence should be admissible as *res gestae* or M.R.E 404(b).[45] Specifically, the Government argued its burden is to prove Appellant was in possession of eight images of child sexual abuse material

[44] R. at 106 (Art. 39(a) of 20 Dec 2022).
[45] R. at 114-130 (Art. 39(a) of 20 Dec 2022).

("CSAM"). The Government said nine other CSAM images from the PDF depicting CSAM "can be included in this case."[46]

The Military Judge responded, "[s]o, beginning with the *res gestae* argument, so you're not even saying this is an example towards *res gestae*, being intrinsic with the charged offense. You're saying this is material of the charged offense."[47] Trial Counsel responded, "We are saying that the Government can include it, yes, it is proving the charged offense."[48] A moment later, the Military Judge again tried to clarify, saying:

> I think *res gestae* is just--is—it's still ultimately not information on which I think the government is basing its prosecution for the—for which the factfinder should decide whether or not it proves the case. *Res gestae* is just other information that's intrinsic, it's intertwined. So, to be clear, you're not saying--in your pleadings, you call it *res gestae*. You're saying those images are--are-- they for the factfinder to determine if that constitutes evidence and support of either of the two charges. Is that accurate?[49]

The Trial Counsel said, "Yes, Your Honor."[50] Again, without addressing how the Trial Counsel's proposal could overcome preferral, Article 32, Article 34, referral or basic due process issues, let alone whether Defense Counsel or Appellant personally could or would waive any of these issues, it appears the Military Judge begins to realize what *res gestae* means. He realizes that is does not support the Trial Counsel's proposal, and gets the Trial Counsel to go with a MRE 404(b) usage for the uncharged misconduct. The Military Judge then said, "Moving to, I guess, the 404(b), if the court doesn't find it's *res gestae* or permissible as evidence in support of the Government's

[46] R. at 114-119 (Art. 39(a) of 20 Dec 2022).
[47] R. at 116 (Art. 39(a) of 20 Dec 2022).
[48] R. at 116 (Art. 39(a) of 20 Dec 2022).
[49] R. at 116 (Art. 39(a) of 20 Dec 2022).
[50] R. at 117 (Art. 39(a) of 20 Dec 2022).

case, for 404(b), can you quickly give me your argument on [M.R.E 404(b)]?"[51] At this point, the Military Judge has demonstrated his understanding of *res gestae* and its limits.[52]

Civilian Defense Counsel then objected to the Government's "pivoting use of" the Hebes PDF.[53] In analyzing the MRE 403 balancing prong of *Reynolds*[54] and discussing the risk of confusing the members, Civilian Defense Counsel said, "*but I guess that's an area where even the defense is confused at this point, as to how this evidence is going to appear at trial*."[55]

Facts Relevant to Issue I, VI, VII (Acquittal, Improper Voting Instructions, related IAC)

B. The Panel informed the Military Judge that they "voted on both specs. but we don't have 3/4 majority on any individual files."[56]

The Government charged Appellant with "knowingly and wrongfully possess[ing] child pornography, to wit: eight digital images of a minor, engaging in sexually explicit conduct, and that said conduct was of a nature to bring discredit upon the armed services."[57]

After each party presented its evidence and closing argument, the military judge instructed the panel to:

> vote on specifications first then charge . . . . Concurrence of at least three-fourths of the members present, when the vote is taken, is required for any finding of guilt. Since we have seven members, that means that six members must concur in any finding of guilty. If you have at least six votes of guilty of any offense, then that will result in a finding of guilty for that offense. If fewer than six members vote for a finding of guilty, then your ballot resulted in a finding of not guilty. You may reconsider any finding prior to its being announced in open court. However, after you vote, if any member expresses a desire to reconsider any finding, open the court, and the president should announce only that reconsideration of a finding has

[51] R. at 117 (Art. 39(a) of 20 Dec 2022).
[52] The Court should review the Military Judge's failure to properly instruct the members and limit the Government's use of these images (or otherwise require an amendment to the Charges in compliance with R.C.M. 603) against this backdrop.
[53] R. at 120 (Art. 39(a) of 20 Dec 2022).
[54] *United States v. Reynolds,* 29 M.J. 105 (C.M.A. 1989).
[55] R. at 127-128 (Art. 39(a) of 20 Dec 2022).
[56] App. Ex. 107.
[57] Charge Sheet at 1.

> been proposed. In this circumstance, do not state whether the finding proposed to be reconsidered is a finding of guilty or not guilty or which specification is involved. I will then give you specific instructions on the procedure for reconsideration. As soon as the court has reached its findings and I have examined the Findings Worksheet, the findings will be announced by Commander [H.] in the presence of all parties.[58]

The Military Judge then provided the panel with a findings worksheet outlining two verdict options for Specification 1: (1) not guilty, or (2) guilty of one or both specifications. Within the second option, if picked, the panel was required to select one of the three choices: (a) not guilty, (b) guilty of possessing eight *or more* images, or (3) guilty of possessing fewer than eight images.[59] If the panel were to reach a guilty verdict, the Military Judge instructed the panel to identify the images they deemed to depict child pornography that the Appellant had knowingly and wrongfully possessed.[60]

The panel was tasked with evaluating each image individually, marking those for which they found the accused guilty and crossing out those for which they found the accused not guilty.[61] The military judge confirmed with the panel president whether he understood and was following the instructions. The panel president confirmed he understood the instructions and did not have any questions.[62]

The Military Judge then explained that if there were questions during deliberations, he would open the court and assist the members. After providing the instructions, a panel member asked the military judge to restate where "you mentioned we, the members, just determine which

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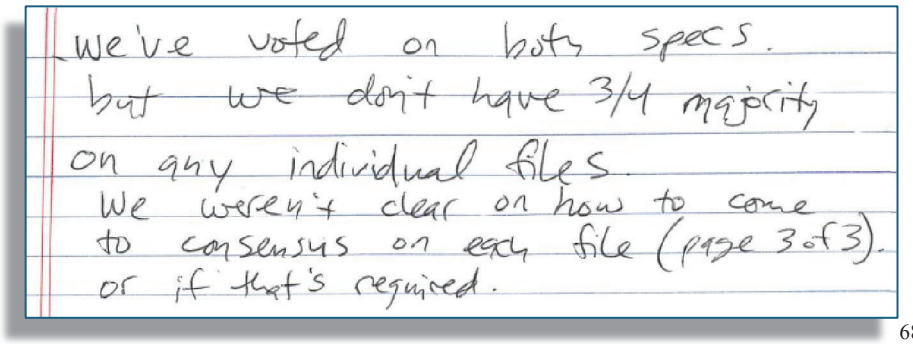
[58] R. at 117-19 (Art. 39(a) of 21 May 2022).
[59] Appellate Ex. 105 at 1. On the Findings Worksheet, the members lined through both options (acquittal and findings of guilt) and lined through "(if finding guilty of possessing less than EIGHT images)". This, along with the members' two differing votes, also raises the question of an ambiguous verdict.
[60] R. at 117-19 (Art. 39(a) of 21 May 2022).
[61] R. at 121 (Art. 39(a) of 21 May 2022).
[62] R. at 123 (Art. 39(a) of 21 May 2022).

charge to vote on and specifically the aspects of do—if we vote on the elements of The Charge."[63] The Military Judge interpreted this question to mean: "a panel member asked for the Military Judge to restate instructions on voting and whether they vote on the elements of the charge."[64] The military judge restated that the members would vote on specifications first and then on the charge. The member indicated the Military Judge's answer was sufficient.[65] After confirming the panel understood these instructions, he adjourned the court-martial for deliberations.[66]

After about five hours of deliberations, the panel submitted a handwritten note to the bailiff.[67] During an Article 39(a), UCMJ, session with the Appellant present, the Military Judge read the note aloud.


We've voted on both specs.
but we don't have 3/4 majority
on any individual files.
We weren't clear on how to come
to consensus on each file (page 3 of 3).
or if that's required.

[68]

Trial Defense Counsel then argued that the note demonstrated that a majority of the panel could not reach a guilty finding on "any individual files," therefore, announcement of the members' vote constituted a not guilty finding for Specification 1.[69] In contrast, the Government initially interpreted the note as showing the members reached a general verdict of guilty for the possession

[63] R. at 124-125 (Art. 39(a) of 21 May 2022).
[64] App. Ex. 119 at 2.
[65] R. at 124-125 (Art. 39(a) of 21 May 2022).
[66] R. at 131 (Art. 39(a) of 21 May 2022).
[67] R. at 134 (Art. 39(a) of 21 May 2022).
[68] App. Ex. 107.
[69] R. at 134-136 (Art. 39(a) of 21 May 2022).

specification.[70] The Military Judge placed the court in recess and conducted an R.C.M. 802 session, asking the parties to clarify their positions.[71]

After the recess, the Government changed their position and asked the Military Judge to re-instruct the panel, perceiving the members' note as a need for clarification.[72] Trial Defense Counsel asserted again that the panel's note revealed a verdict of not guilty, specifically highlighting that none of the images received a three-quarters (six-member) vote.[73] The Government then proposed providing an instruction to the members.[74] Without asking the members for clarification on their note, the Military Judge provided additional standard voting instructions to the members, but not a reconsideration instruction. See Issue V.

Facts Relevant to Issue VIII (Legal and Factual Sufficiency)

C. The evidence was legally and factually insufficient to prove Appellant could have knowingly possessed the images at issue because they existed in cache memory.

Images containing possible child pornography were found on Appellant's phone and hard drive during a forensic examination.[75] These files were located in unallocated space and cache files, making them not readily accessible without specialized forensic software.[76] Mr. [redacted] the Government's expert witness, conducted a detailed forensic analysis of the files. He later testified that the images were in locations that are not easily accessible to an average user and require specific forensic software to retrieve.[77]

[70] R. at 135 (Art. 39(a) of 21 May 2022).
[71] R. at 137 (Art. 39(a) of 21 May 2022).
[72] R. at 137 (Art. 39(a) of 21 May 2022).
[73] R. at 137-140 (Art. 39(a) of 21 May 2022).
[74] R. at 141 (Art. 39(a) of 21 May 2022).
[75] R. at 290 (Art. 39(a) of 15 May 2022).
[76] R. at 238 (Art. 39(a) of 15 May 2022).
[77] R. at 189, 251 (Art. 39(a) of 15 May 2022).

The Hebes PDF file was found on Appellant's personal cell phone.[78] This file contained a collage of at least eight images of CSEM and a list of 35-37 file names and/or search terms associated with CSEM-related language.[79] Multiple downloaded files were also discovered on Appellant's external hard drive, along with his search and web history that include terms associated with the sexualization of women of legal age.[80]

Pornographic images of what appear to be adult women portrayed as under the age of eighteen were discovered on Appellant's external hard drive.[81] Appellant's personal cell phone contained instructions and information from The Onion Routing project (Tor), an open-source privacy network that enables anonymous web browsing and access to the dark web.[82] However, no evidence was presented showing that Appellant used search terms associated with child pornography to locate or download the images found in unallocated space or cache files. The Government's expert did not find any search terms on Kelley's computer specifically linked to these images.[83] Appellant's affidavit further clarifies he believed the category of porn he was downloading from FrostWire was legal and involved women of legal age.[84]

There was no evidence that Appellant attempted to save, email, print, or otherwise preserve the images found in the cache and unallocated space.[85] Furthermore, the Government presented

[78] XVII at 6 (Gov. Resp. to Def. Motion to Exclude M.R.E. 404(b) (see encl. 4 (sealed, per App. Ex. XVII).
[79] Pros. Ex. 11, 12 (CD3 and CD4).
[80] XVII at 7 (Gov. Resp. to Def. Motion to Exclude M.R.E. 404(b) (see encl. 9 (sealed, per App. Ex. XVII).
[81] XVII at 8 (Gov. Resp. to Def. Motion to Exclude M.R.E. 404(b) (see encl. 10 (sealed, per App. Ex. XVII).
[82] XVII at 10 (Gov. Resp. to Def. Motion to Exclude M.R.E. 404(b) (see encl. 6, 12 (sealed, per App. Ex. XVII).
[83] R. at 701 (Art. 39(a) of 17 May 2022) (cross examination of Special Agent D.R.).
[84] App. Ex. XVI at 7 (Appellant's Affidavit).
[85] R. at 217 (Art. 39(a) of 19 May 2023) (cross examination of Special Agent C.C.).

no evidence that Appellant took any steps to conceal or delete the images. Mr. [redacted] admitted under cross-examination that he could not determine if the images were ever viewed by Appellant.[86] He was uncertain whether the images were part of an automatically cached webpage or if Appellant had interacted with them in any manner indicating awareness of their presence.[87]

Summary of Argument

This case presents an alarming blend of significant issues, many of which on their own would justify setting aside the findings and sentence. In the aggregate, these issues were so prejudicial to Appellant that the only meaningful relief is to set aside the conviction with prejudice. The seven assignments of error in this case arise from four primary factual or legal scenarios.

First, the panel President's statement to the Military Judge specified that the members voted on both specifications of the Charge, and voted to acquit on both because they had not reached the necessary three-fourths majority vote on any image. The panel's vote resulted in a full acquittal. Without asking the panel President to clarify any confusion, the Military Judge erroneously re-instructed the members on the voting procedures, and sent the members back for more deliberations after they told the Court-Martial they already voted to acquit. The members then returned, having voted again but this time to convict. The members improperly reconsidered their vote without first requesting reconsideration instructions as directed. Furthermore, the Military Judge did not instruct the members on reconsideration, or otherwise cure this issue.

Second, the Findings Worksheet listed eleven images, but Specification 1 only listed eight. The number of images is one major change to the specification that took place post-referral. Another significant variance was the fact that the four added images were different from those

[86] R. at 221 (Art. 39(a) of 19 May 2022).
[87] R. at 76 (Art. 39(a) of 20 May 2022).

noticed as being part of Specification 1. One of those four images was actually a PDF file, "Hebes," which itself contained as many as eight additional images of child pornography within a collage of images. Thus, Appellant was charged with possessing eight images (as identified in the Article 32 and referral processes), yet eleven appeared on the Findings Worksheet, and from those eleven named images, the members viewed a total of eighteen actual images from which they were permitted to base their findings.

Third, the Military Judge erroneously permitted these four images to be added to the Findings Worksheet to prove knowing and wrongful possession of child pornography without requiring the Government to amend the charge sheet, conduct an Article 32 preliminary hearing, seek Article 34 advice prior to referral, or arraign Appellant on the amended charge for these additional offenses. In so doing, the Government and Military Judge misused the concept of *res gestae*. *Res gestae* is an evidentiary principle that permits admission of evidence to prove the crime itself (as opposed to other limited uses). It is not, and should not have been considered, a back-door to amending the charge sheet without all of the procedural due process required by the Rules for Courts-Martial. This was a fundamental violation of due process, which severely prejudiced Appellant because it resulted in his conviction.

Initially, the Government was only going to use this evidence for permitted M.R.E. 404(b) purposes (and later to prove the elements—*mens rea*—for the eight images that were properly charged, noticed, and referred). However, the Military Judge's evidentiary rulings should not have resulted in the addition of these offenses to the Findings Worksheet as a *de facto* amended charge. The Military Judge misunderstood the Government's intended uses of this evidence, the corresponding defense position, and he had multiple opportunities to resolve that confusion, but erroneously failed to do so.

If this Court takes the rather extraordinary view that Civilian Defense Counsel waived Appellant's due process rights including notice, proper charging, Article 32 and Article 34 procedures, proper referral, and arraignment for each of the four images ostensibly added to the specification post-referral, and without specific colloquy from the Military Judge, then the only conclusion that can follow is that Appellant received ineffective assistance from his counsel. Even if the Court finds Civilian Defense Counsel did waive the bulk of Appellant's due process rights, neither he, the Trial Counsel, nor the Military Judge had the authority to refer the additional images to this Court-Martial, and the Convening Authority took no such action to refer the additional images. Thus, the offenses that served as the basis for Appellant's conviction were never properly before the Court-Martial, and the Court lacked jurisdiction.

Lastly, the evidence was legally and factually insufficient to prove that Appellant could have knowingly possessed the images at issue because they existed in cache memory.

Argument

I.

APPELLANT WAS ACQUITTED.

Standard of Review

Questions of law are reviewed *de novo*.[88]

Law and Analysis

After deliberating, the members provided a note to the Court, saying, "[w]e've voted on both specs. but we don't have ¾ majority on any individual files. We weren't clear on how to come to consensus on each file (page 3 of 3). Or if that's required."[89]

[88] *United States v. Pease*, 75 M.J. 180, 184 (C.A.A.F. 2016).
[89] App. Ex. 107.

Rule for Courts-Martial 921(c)(3) states, "*Acquittal*. If fewer than three-fourths of the members present *vote* for a finding of guilty, *a finding of not guilty* <u>*has resulted*</u> as to the charge or specification on which the vote was taken."[90] The members told the Court that they voted, and that fewer than three-fourths of the members voted to convict on *any* individual files. That is a *finding* of acquittal under Rule for Courts-Martial 921(c)(3).[91] Courts-martial are not required to reach a unanimous verdict, as is common in civilian courts.[92]

At trial, Civilian Defense Counsel moved orally for appropriate relief, which he later supplemented in writing.[93] He sought to set aside the findings of guilt based on the "apparent announcement of [a] not-guilty determination by the members."[94] The military judge issued a ruling[95] and an amended ruling,[96] finding that the members' question to the Military Judge was not an *announcement* of findings. However, The Military Judge never directly addressed the issue Appellant now presents: "was Appellant acquitted?"

The only potential ambiguity in the members' question arises when reading, "[w]e weren't clear on how to come to consensus on each file (page 3 of 3) or if that's required."[97] The Military Judge stated in his ruling that there were indications both that the members had voted, and had not voted. He said:

> This comment may have referred to a number of stages of the deliberative process, including the "full and deliberative discussion" envisioned by R.C.M. 92l(d). The

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[90] Rule for Courts-Martial 921(c)(3), Manual for Courts-Martial (2019).
[91] Rule for Courts-Martial 921(c)(3), Manual for Courts-Martial (2019).
[92] *United States v. Anderson*, 83 M.J. 291, 296 (C.A.A.F. 2023), *cert. denied*, 144 S. Ct. 1003, 218 L. Ed. 2d 21 (2024).
[93] R. at 152-54.
[94] App. Ex. 110 (Def. Post-Trial Motion for Appropriate Relief).
[95] Appellate Ex. 117 (Ruling on Def. Post-Trial MFAR).
[96] Appellate Ex. 119 (Amended Ruling on Def. Post-Trial MFAR).
[97] App. Ex. 107.

> statement "we weren't clear on how to come to consensus" *suggests that they had not voted regarding the specific files.*[98]

This sits in contrast with the Military Judge's other statement:

> The question *indicates that the members had voted on the specifications* but neither the question nor CDR [H.], the panel president, indicated whether the panel had found the accused guilty or not guilty of either of the offenses and whether the findings worksheet had been completed.[99]

Just because the members could not reach a consensus to convict does not mean that they did not vote. If anything, that reiterates their vote resulted in an acquittal. There is no need for the Military Judge's guesswork because the members told the Military Judge "we've voted on both specs" and that they "don't have ¾ majority on any individual files."[100] In his analysis, the Military Judge repeats that the panel President did not "indicate" whether the members found the accused guilty or not guilty. They may not have said the magic words "we find," but they certainly said "we've voted." Furthermore, the Miliary Judge refused to let the panel President ask questions.[101]

Nonetheless, the Military Judge noted, "there was significant ambiguity about the nature of the [members'] question and where in the deliberative process the members were at the time of the question."[102]

> At that point, the military judge should have confirmed with the panel president whether the panel formally voted on each of the three specifications of [the Charge]. Doing so could have been accomplished without disclosing the results of the vote on each specification and would also have provided complete information to the military judge, and the parties, in determining how to further instruct the panel.[103]

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[98] App. Ex. 119 at 6-7 (emphasis added) (Amended Ruling on Def. Post-Trial MFAR).
[99] App. Ex. 119 at 6 (emphasis added).
[100] App. Ex. 107.
[101] R. at 143.
[102] Appellate Ex. 119 (Amended Ruling on Def. Post-Trial MFAR).
[103] *United States v. Reyes-Lesmes*, No. ARMY 20180396, 2020 WL 6533831, at *5 (A. Ct. Crim. App. Nov. 4, 2020).

As the Army Court of Criminal Appeals noted above, if the Military Judge was unclear about what the panel President meant, he should have asked. Without inquiring into how any individual panel member voted, the Military Judge could have asked:

(1) Did every member vote on both specifications?
(2) Did every member vote on each individual file?
(3) Did six or more members vote to convict on any individual file?
(4) Do the members have other questions for the Court at this time?

Instead of engaging in the required colloquy, the Military Judge flatly refused to clarify the ambiguity he saw with the members' statement. Then, the Military Judge erroneously sought to determine whether the reading of the members' question was an announcement of an acquittal.[104]

There are a number of cases discussing reconsideration and what constitutes an *announcement*,[105] but those issues are irrelevant because announcement is not the determining factor for when a *finding* has been made under Rule for Courts-Martial 921(c)(3).[106] Announcement is the point after which such a finding may no longer be *reconsidered*, if sought

[104] Appellate Ex. 119 (Amended Ruling on Def. Post-Trial MFAR).
[105] *United States v. McAllister*, 42 C.M.R. 22, 23 (1970) (finding no announcement where the members voted to acquit but with one abstention); *United States v. London*, 15 C.M.R. 90 (1954); *United States v. Boswell*, 23 C.M.R. 369, 372 (1957) (*see Boswell's* summary of *London* at 373); *United States v. King*, 22 C.M.R. 856, 858 (1956); *United States v. Augspurger*, 61 M.J. 189 (C.A.A.F. 2005) (It is the responsibility of military judges to ensure that any ambiguities in findings are clarified before the findings are announced, and if they fail to do so, the appellate courts cannot rectify that error); *United States v. Perez*, 40 M.J. 373 (C.M.A. 1994); *United States v. Parker*, No. ARMY 20180672, 2021 WL 306493, at *1 (A. Ct. Crim. App. Jan. 29, 2021); *United States v. Reyes-Lesmes*, No. ARMY 20180396, 2020 WL 6533831, at *3 (A. Ct. Crim. App. Nov. 4, 2020).
[106] Rule for Courts-Martial 921(c)(3), Manual for Courts-Martial (2019).

by the members.[107] The members' second vote differed from the *known* findings that resulted from their first vote.[108] However, the findings were never properly reconsidered.[109]

Conclusion

The members voted to acquit Appellant because they voted "on both specs" but did not "have a ¾ majority on any individual files." This was a *finding* of acquittal under Rule for Courts-Martial 921(c)(3). This finding was never properly reconsidered under Rule for Courts-Martial 924. This error was highly prejudicial to Appellant, and directly resulted in a conviction for offenses for which he had just been found not guilty. Therefore, this Court must set aside the findings of guilt in Specification 1 with prejudice.

II.

APPELLANT WAS DEPRIVED OF DUE PROCESS WHEN HE WAS CONVICTED OF OFFENSES DIFFERENT FROM: THOSE CHARGED WITH SPECIFICATION 1, THOSE THAT SERVED AS THE BASIS FOR THE ARTICLE 32 PRELIMINARY HEARING AND THE PRELIMINARY HEARING OFFICER'S PROBABLE CAUSE DETERMINATION, AND THOSE THAT SERVED AS THE BASIS FOR THE ARTICLE 34 ADVICE AND REFERRAL.

Standard of Review

Courts review *de novo* whether constitutional errors were harmless beyond a reasonable doubt.[110]

Law and Analysis

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[107] Rule for Courts-Martial 924, Manual for Courts-Martial (2019).
[108] The fact that the results of the first vote were known in this case is a key fact that distinguishes this case from the reconsideration cases cited above.
[109] See Issue V (discussing the Military Judge's erroneous instructions to the Members during deliberations, and on the topic of reconsideration).
[110] *United States v. Grijalva*, 55 M.J. 223 (C.A.A.F. 2001) (*citing Arizona v. Fulminante*, 499 U.S. 279, 295 (1991)).

"No principle of procedural due process is more clearly established than that notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge, if desired, are among the constitutional rights of every accused in a criminal proceeding in all courts, state or federal."[111] Appellant was convicted of offenses for which he was never charged. As such, "[t]he rights at issue in this case are constitutional in nature."[112] The Court in *Girouard* continued,

> The Fifth Amendment provides that no person shall be "deprived of life, liberty, or property, without due process of law," U.S. Const. amend. V, and the Sixth Amendment provides that an accused shall "be informed of the nature and cause of the accusation," U.S. Const. amend. VI. Both amendments ensure the right of an accused to receive fair notice of what he is being charged with. *See Apprendi v. New Jersey,* 530 U.S. 466, 476, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); *Cole v. Arkansas,* 333 U.S. 196, 200, 68 S.Ct. 514, 92 L.Ed. 644 (1948); *see also Jones,* 68 M.J. at 468. **But the Due Process Clause of the Fifth Amendment also does not permit convicting an accused of an offense with which he has not been charged**. *See United States v. Marshall,* 67 M.J. 418, 421 n. 3 (C.A.A.F.2009) (**noting the government's dual due process obligations of fair notice and "proof beyond a reasonable doubt of the *offense alleged***" [emphasis added]). As the Supreme Court explained in *Patterson v. New York,* "the Due Process Clause requires the prosecution to prove beyond a reasonable doubt all of the elements included in the definition of the offense *of which the defendant is charged*." 432 U.S. 197, 210, 97 S.Ct. 2319, 53 L.Ed.2d 281 (1977) [emphasis added]; *see also United States v. Wilcox,* 66 M.J. 442, 448 (C.A.A.F.2008) ("To satisfy the due process requirements of the Fifth Amendment, the Government must prove beyond a reasonable doubt every element of the *charged offense*." [emphasis added]).[113]

While charged with wrongfully possessing eight images of child pornography, Appellant stands convicted of possessing two other images of child pornography. Although the specification lacks specific information regarding the identification of the eight images, this was addressed

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[111] *United States v. Fosler*, 70 M.J. 225 (C.A.A.F. 2011) (*citing Cole v. State of Arkansas*, 333 U.S. 196 (1948)).
[112] *United States v. Girouard*, 70 M.J. 5, 10 (C.A.A.F. 2011).
[113] *United States v. Girouard*, 70 M.J. 5, 10 (C.A.A.F. 2011).

during the Article 32 hearing.[114] The Government made clear at that point what eight specific images made up the charged offense and against which the Appellant must defend.

It is these eight images upon which the PHO made his probable cause determination and recommendation.[115] It is these eight images the Staff Judge Advocate considered in the PHO report when providing her Article 34 Advice to the Convening Authority regarding referral.[116] As such, these eight images are the ones the Convening Authority used when referring the Charge and Specifications to the General Court-Martial. These are the eight images upon which Appellant was arraigned.[117]

While Appellant stands convicted of Specification 1 and The Charge, it is not for possession of any of these eight images. To the contrary, Appellant stands convicted for the offense of possessing two *other* images of child pornography. These two other images were never included in: (1) a preferred Charge;[118] (2) an Article 32 investigation or probable cause determination;[119] (3) an SJA recommendation under Art. 34;[120] (4) a referred Charge;[121] or (5) a Charge on which he was arraigned.[122] In fact, the Specification on which he was convicted was never amended[123] to reflect that the Government added additional images to the eight used to support the charge.

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[114] Audio Recording of Art. 32 Preliminary Hearing at timestamp 26:14-26:35; Art. 32 Report at 1.
[115] Art. 32 Report at 1.
[116] Staff Judge Advocate's Pretrial Art. 34 Advice memo 5811 of 26 May 2022.
[117] R. at 12-14 (Art. 39(a) of 21 July 2022 - arraignment).
[118] Art. 30, UCMJ (10 U.S.C. § 830) (Charges and Specifications).
[119] Art. 32, UCMJ (10 U.S.C. § 832) (Preliminary hearing required before referral to GCM).
[120] Art. 34, UCMJ (10 U.S.C. § 834) (Advice to convening authority before referral for trial).
[121] Rule for Courts-Martial 601, Manual for Courts-Martial (2024) (Referral).
[122] Rule for Courts-Martial 904, Manual for Courts-Martial (2024) (Arraignment).
[123] Rule for Courts-Martial 603, Manual for Courts-Martial (2024); *see also* Rule for Courts-Martial 601(e)(2) (joinder of offenses).

But how can that be true? Pursuant to the Supreme Court's decision in *Dunn v. United States*, "[f]ew constitutional principles are more firmly established than a defendant's right to be heard on the specific charges of which he is accused."[124] As recounted elsewhere in this brief, it appears this violation of Appellant's fundamental due process rights, afforded him by the Constitution and the UCMJ, was caused by failures on the part of the Military Judge, Trial Counsel, and at times the Defense Counsel.

The Trial Counsel, while citing to the evidentiary rule of *res gestae*, adopted a completely unsupported and unprecedented theory that as long as someone is charged with possessing child pornography, any images of child pornography possessed by an accused can be added as substantive offenses at any time in the proceeding—even when they are different images from those the Government explicitly identified as the basis for the Specification. [125]

The Military Judge, and perhaps even the Trial Counsel, utterly failed to grasp the significance of the Government's proposal. Instead of clarifying the issue and possibly realizing the due process implications of what the Government was doing, he chose to treat an ambiguous comment made by Appellant's counsel in an email as effectively waiving or conceding the issue.[126] In an unprecedented decision, by merely allowing the Government to add images to the Findings Worksheet, the Miliary Judge permitted the Government to add offenses that Appellant had neither been charged with nor had ever, or would ever, appear on a charge sheet.

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[124] *Dunn v. United States*, 442 U.S. 100, 106 (1979).
[125] App. Ex. XIV at 22 (Gov. MRE 404(b) notice of 08Aug22 (dated 2021); App Ex. XV (Gov. Resp. to Def. Motion to Exclude MRE 404(b) of 11Oct22; App. Ex. XVII (Gov. Resp. to Def. Motion to Exclude MRE 404(b) of 13Dec22); R. at 1 (Art. 39(a) of 20Dec22 – MRE 404(b) motions hearing).
[126] App. Ex. XIX (Ruling on Def. Motion to Exclude MRE 404(b) of 11Oct22); R. at 1 (Art. 39(a) of 20Dec22 – MRE 404(b) motions hearing); App. Ex. 47 (Military Judge's email re: Findings Worksheet); App. Ex. 48 (Defense's email response to Military Judge's email).

The Government responded on 11 October 2022, basically arguing that its proffered evidence was admissible under M.R.E. 404 (b).[127] So far, this is still within the bounds of M.R.E. 404(b) and not a due process issue. It appears the Government makes the leap from proposing to use the additional images permissibly, to concocting a theory which will result in a due process violation, in their 13 December 2022 response to Appellant's motion to exclude M.R.E. 404(b) evidence, quoted in the facts section above.[128] At the motions hearing held a few days after this document was submitted, the government made a similar statement that these offenses "can be included in this case." [129]

The Government asserted that, simply by characterizing the images as *res gestae,* they could include them as part of the Specification because they meet the definition of child pornography. [130] The Government seems to have misunderstood the permissible limits of admitting evidence as *res gestae*, and managed to confuse the Military Judge and everyone in the process.

The CAAF in *St. Jean* defined *res gestae* "as '[t]he events at issue, or other events contemporaneous with them."[131] There may be other independent bases to admit evidence, such as for MRE 404(b) purposes, but *res gestae* is an evidentiary principle that permits admission of evidence to prove the crime itself. It is not, and should not be considered, a back-door to amending a charge sheet without all of the procedural due process required by the Rules for Courts-Martial.

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[127] App. Ex. XV (Gov. Resp. to Def. Motion to Exclude MRE 404(b) of 11 Oct 22). The Government also references a supplemental notice of 07Oct22 at 1, which is later identified as Enclosure 7 to App. Ex. XVII (Gov. Resp. to Def. Motion to Exclude MRE 404(b) of 13 Dec 22). The following exhibit, App. Ex. XVIII, is sealed, but the Sealing Order does not specifically mention including enclosures from App. Ex. XVII.
[128] App. Ex. XVII (Gov. Resp. to Def. Motion to Exclude MRE 404(b) of 13 Dec 22).
[129] R. at 115 (Art. 39(a) of 20Dec22 – MRE 404(b) motions hearing).
[130] Referring to the images from the collage of images in Hebes.pdf.
[131] *United States v. St. Jean*, 83 M.J. 109, 112 (C.A.A.F. 2023) (citing *Black's Law Dictionary* 1565 (11th ed. 2019).

The best examples of potential *res gestae* here would be evidence of Appellant's internet search terms as helping to establish Appellant's mens rea, or the phone applications Tor and FrostWire as tending to show that Appellant may have used these applications to access contraband online. This is in addition to any permissible MRE 404(b) use for such evidence.

Hypothetical to Illustrate *Res Gestae*: Receipt of stolen property under Art. 122a, UCMJ

To illustrate, consider a hypothetical servicemember convicted of receiving stolen property under Art. 122a, UCMJ. That offense also includes elements of wrongful and knowing possession of certain contraband (stolen) items, similar in a way to Specification 1 here. In this example, the Government charged the appellant with receiving two stolen power tools. At the Article 32 hearing, the Government said the two tools for the specification were a power drill, and a jig saw. These were the only two tools noticed as being part of the specification.

These tools were of the same brand and from a matching line of products, and had the initials, [redacted] written on them. In its MRE 404(b) notice, the Government informed the defense that it intended to use additional evidence properly seized from appellant's truck—a power sander and its box—as evidence of the charged offense (receipt of the other two tools) as *res gestae*. The power sander had the initials [redacted] written on it, but also included the former owner's full name (e.g., [redacted], and it came in a box meant to carry two additional tools—a power drill, and a jig saw like the ones charged.

The Government in this hypothetical could properly use this evidence under MRE 404(b) to prove the appellant's knowledge that [redacted] meant [redacted] on the two charged tools, or perhaps lack of accident or mistake. Likewise, the Government could try to use this evidence as proof of the crime itself as *res gestae*. The tools all fit into the box with the power sander, they are of the same product line and color, etcetera. Further, the victim, [redacted] testified that all three items

were in the box when it was stolen. The thief struck an immunity deal with the assistance of counsel and testified that he sold all three items together in the box to the appellant.

While the Government in this example could characterize this evidence as *res gestae* to properly admit it to prove the elements of the charged offense (receipt of stolen property, to wit: a power drill and jig saw), the Government and Military Judge could not rely on *res gestae* or MRE 404(b) to add the power sander to the findings worksheet or otherwise as a means of amending the charge (without withdrawing and re-preferring and referring anew under R.C.M. 603). They are all tools, and they were all stolen, but the appellant was never charged with receipt of *three* stolen power tools, or having stolen this power sander specifically. Likewise, such a charge was never referred.

As discussed in Issue III,[132] the Government here wanted Hebes PDF to be considered as a new offense because the depicted images were much more damming,[133] and the Government said there were more indicia of possession and control over that file than the eight charged images.[134] The Government made a strategic mistake in selecting the offenses it chose to prosecute. Rather than follow Rule for Courts-Martial 603 to amend the Charge Sheet, the Military Judge erroneously permitted a *de facto* amendment; any such amendment was never referred, nor in compliance with Art. 32 or Art. 34. This not only created the jurisdictional problem discussed in

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[132] Issue III (Lack of jurisdiction after the Military Judges erroneously permitted additional offenses to be considered as part of Spec. 1).
[133] R. at 74 (Art. 39(a) of 21 May 2023) (Civilian Defense Counsel said on closing argument in reference to the Hebes.pdf, "it is disgusting. It is the only obvious child pornography in this case. It's got like little kids, and its bad.").
[134] R. at 116 (Gov. rebuttal) ("[T]he Hebes PDF had to have been opened to have been created into the cache, to have been created into a thumbnail."); App. Ex. XVII at 7 (Gov. Resp. to Def. Motion to Exclude MRE 404(b) of 13Dec22) ("Through testimony, the Government will be able to provide that the location that the Hebes.pdf was found in the "Downloads" folder of the Accused's personal cell phone, which requires action by the user to open, view, and download the document onto their phone.").

Issue III,[135] but the Military Judge also violated Appellant's due process right to notice and to be convicted of only crimes for which he was charged.[136]

"[T]here is a presumption against the waiver of constitutional rights, and for a waiver to be effective it must be clearly established that there was an intentional relinquishment or abandonment of a known right or privilege."[137] For the same reasons articulated in Issues III and VI, neither Appellant nor his Counsel intentionally relinquished or abandoned Appellant's rights to due process, proper notice, or to be convicted only of offenses for which he has been properly charged. The Military Judge did not engage in a waiver colloquy with Appellant inquiring as to any such waiver.

Conclusion

The Military Judge's failure to ensure Appellant received due process was not harmless beyond a reasonable doubt,[138] as the lack of due process not only contributed to, but likely directly resulted in Appellant's only convictions. "Conviction upon a charge not made would be sheer denial of due process."[139] This is exactly what happened in Appellant's case and as such his convictions must be dismissed with prejudice.

III.

THE COURT-MARTIAL LACKED JURISDICTION BECAUSE THE MILITARY JUDGE ERRONEOUSLY INSTRUCTED THE MEMBERS ON ADDITIONAL OFFENSES TO BE CONSIDERED AS PART OF SPECIFICATION 1 AFTER REFERRAL, OVER DEFENSE OBJECTIONS, WITHOUT WITHDRAWING, PREFERRAL ANEW, AND WITHOUT SUBSEQUENT REFERRAL, AS REQUIRED BY R.C.M. 603.

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[135] *United States v. Reese*, 76 M.J. 297, 301 (C.A.A.F. 2017).
[136] *United States v. Girouard*, 70 M.J. 5, 10 (C.A.A.F. 2011).
[137] *Id.* (citing *United States v. Harcrow*, 66 M.J. 154, 157 (C.A.A.F. 2008)).
[138] *Grijalva*, 55 M.J. 223.
[139] *De Jonge v. State of Oregon*, 299 U.S. 353 (1937).

Standard of Review

Appellate courts "review jurisdictional questions *de novo*."[140]

Law and Analysis

"The due process principle of fair notice mandates that 'an accused has a right to know what offense and under what legal theory' he will be convicted."[141] Furthermore, "the Due Process Clause of the Fifth Amendment also does not permit convicting an accused of an offense with which he has not been charged."[142] "If during the trial there is evidence that the accused may be guilty of an untried offense not alleged in any specification before the court-martial" it was the Military Judge's responsibility to ensure the court-martial proceeded "with the trial of the offense charged."[143] Under Rule for Courts-Martial 603, after referral, a major change may not be made to a charge or specification over the objection of the accused unless the charge or specification is withdrawn, amended, and referred anew.[144]

> The practical effect is that if a change [to a charge] is major and the defense objects, the charge has no legal basis and the court-martial may not consider it unless and until it is "preferred anew," *and subsequently referred* [emphasis added]. *See* R.C.M. 201(b)(3). To the extent our precedent has required a separate showing of prejudice under these circumstances, it is overruled: absent "preferr[al] anew" *and a second referral* there is no charge to which jurisdiction can attach, and Article 59(a), UCMJ, 10 U.S.C. § 859(a) (2012), is not, in fact, implicated.[145]

A. Appellant was not Charged with Knowing and Wrongful Possession of the Two Images for which he was Convicted.

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[140] *United States v. Ballan*, 71 M.J. 28, 32 (C.A.A.F. 2012).
[141] *United States v. Tunstall*, 72 M.J. 191, 192 (C.A.A.F. 2013) (citing *United States v. Jones,* 68 M.J. 465, 468 (C.A.A.F. 2010)); *see also*, *United States v. Medina,* 66 M.J. 21, 26–27 (C.A.A.F. 2008); *United States v. Wilkins*, 71 M.J. 410 (C.A.A.F. 2012).
[142] *Id*. (citing *United States v. Girouard,* 70 M.J. 5, 10 (C.A.A.F. 2011)); *see also*, *Cole v. State of Ark*., 333 U.S. 196 (1948); *United States v. Tunstall*, 72 M.J. 191, 192 (C.A.A.F. 2013).
[143] Rule for Courts-Martial 801(d), Manual for Courts-Martial (2019).
[144] Rule for Courts-Martial 603, Manual for Courts-Martial (2024 ed.).
[145] *United States v. Reese*, 76 M.J. 297, 301 (C.A.A.F. 2017).

The Charge Sheet does not identify any of the original eight noticed images that the Government stated formed the basis of Specification 1 of the sole Charge.[146] However, Appellant concedes that he had notice of these original eight images because they were identified during the Article 32, and that a Bill of Particulars was not necessary as to those eight images.[147] However, four different images were ultimately added to the Findings Worksheet *after* the Article 32 preliminary hearing and *after* referral.[148] The panel's finding of guilt specified two images total, and they came from these four additional images.

The Military Judge erroneously permitted these four images to be included on the Findings Worksheet and erroneously instructed the members to make findings for these images. This furthered the Government's attempt to make a major change to Specification 1 *de facto*, after referral. Additionally, the Charge and Specification 1 were never actually withdrawn, amended, re-preferred, or referred anew to reflect the addition of these four images to the Specification.

B. The Two Images for which Appellant was Convicted Were Not Properly Referred to this Court-Martial.

"The law is well settled that '[a]lthough the [referral] order is a jurisdictional prerequisite, the form of the order is not jurisdictional.'"[149] In *Ballan*, a military judge, sitting as a general court-

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[146] Audio Recording of Art. 32 Preliminary Hearing at timestamp 26:14-26:35 (emphasis added); Art. 32 Report at 1.

[147] There is discussion in the record (App. Ex. 47; R. at 979) about ensuring this Court could conduct a proper factual sufficiency review under Art. 66, UCMJ. The Military Judge relied upon *United States v. Dow*, No. ARMY 20200462, 2022 WL 2161607, at *2 (A. Ct. Crim. App. June 14, 2022) as to why each *charged* image should be listed on the Findings Worksheet. However, *Dow* does not serve as authority to simply add images - uncharged and unreferred crimes – to the Findings Worksheet. See Issue IV (fatal variance).

[148] Note that only seven of the eight noticed images appear on the Findings Worksheet. When the Government added four uncharged images, the total came to eleven, not twelve.

[149] *United States v. Ballan*, 71 M.J. 28, 32 (C.A.A.F. 2012) (where Colonel Brubaker argued on behalf of Appellee) (citing *United States v. Wilkins*, 29 M.J. 421, 424 (C.M.A. 1990); *see also*,

martial, convicted appellant, pursuant to his pleas, of one specification of sodomy with a child under the age of twelve, one specification of indecent acts with a child, and eight specifications of indecent acts with another, in violation of Articles 125 and 134, UCMJ.[150] The CAAF reasoned that:

> [c]hanging the charge from a violation of Article 120, UCMJ, to a violation of Article 134, UCMJ, was, admittedly, a major change. *See* R.C.M. 603(a). And R.C.M. 603(d) provides that major "[c]hanges or amendments to charges or specifications . . . may not be made over the objection of the accused unless the charge or specification affected is preferred anew.

The CAAF considered the appellant's actions in *Ballan* as agreeing to an amendment to the charge and specification, even though the charge sheet itself was not physically amended.[151] However, the appellant in *Ballan* "not only did not object to the change, he proposed the change in his pretrial agreement, explained to the military judge why he was guilty before the plea was accepted, and benefited from the amendment."[152] But unlike *Ballan* and the *Wilkins* case it cites, Appellant did not enter into any plea agreement or explicitly waive his right.[153]

In fact, Appellant contested the allegations here, and there is no Convening Authority action which expressly or implicitly referred the new offenses – the added images to the Findings Worksheet – to this Court-Martial. A "convening authority or superior competent authority may withdraw charges from a court-martial at any time before findings are announced," and "such

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United States v. Parker, 59 M.J. 195 (C.A.A.F. 2004); *United States v. Simmons*, 82 M.J. 134 (C.A.A.F. 2022).

[150] *Ballan*, 71 M.J. at 32.

[151] *Id*. at 32.

[152] *Id*. at 32.

[153] Further, the Court in *Ballan* looked to both the appellant's conduct, as well as that of the convening authority. The argument is significantly weaker here that Appellant agreed to the added charges because there is no plea agreement or unambiguous waiver. Likewise, the Convening Authority in *Ballan* implicitly referred the lesser Article 134 specification to the court-martial when he or she accepted the plea agreement.

charges may be re-referred to another court-martial, 'unless the withdrawal was for in improper reason."[154] However, the Convening Authority did not withdraw, amend, re-prefer, or refer charges anew. Regardless of how this Court interprets Civilian Defense Counsel's actions, these additional offenses were never referred to Appellant's Court-Martial. Under *Reese*, that means the Court lacked jurisdiction over the new offenses.[155]

C. Appellant was prejudiced by the Military Judge's de facto inclusion in Specification 1 of these particular images.

Under Rule for Court-Martial 603(b)(1), "a major change is one that adds a party, *an offense*, or a *substantial matter not fairly included in the preferred charge or specification, or that is likely to mislead the accused as to the offense charged"* [emphasis added].[156] The addition of four fundamentally different images of possible child pornography constituted a major change. Each image depicted a separate offense, each image was found in a different location, with different metadata, required different analysis from the digital forensic experts, and arguably would require a different defense theory.[157] The Military Judge failed to frame the Government's intended use of these images as an R.C.M. 603 issue. Had he done so, he might have had the opportunity to engage in a colloquy with Appellant and unambiguously ask his counsel whether the Defense waived these major changes.

The addition of the four images to the Findings Worksheet had the effect of adding offenses to Specification 1, offenses which could have been charged as separate crimes. As noted, one of the four added images was the Hebes PDF, for which Appellant was convicted. This file actually included at least eight images of possible child pornography in a collage format. These substantial

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[154] *United States v. Haagenson*, 52 M.J. 34, 35 (C.A.A.F. 1999).
[155] *United States v. Reese*, 76 M.J. 297, 301 (C.A.A.F. 2017).
[156] Rule for Courts-Martial 603(b), Manual for Courts-Martial (2024 ed.).
[157] R. at 153 (Art. 39(a) of 20 Dec 2022).

matters were not fairly included in the eight specific images the Government said constituted Specification 1. They increased the severity of the alleged offenses because they increased the number of alleged crimes, and the nature of the child pornography depicted in the Hebes PDF was significantly more prejudicial than the other images. Regardless, under *Reese*, a showing of prejudice is not required.[158]

D. Although there was much confusion regarding the Government's intended use of the additional images and permissible scope permitted by the Military Judge, neither Appellant nor Civilian Defense Counsel intentionally relinquished or abandoned Appellant's due process rights generally, or to proper preferral, Article 32, Article 34, referral, or arraignment for these offenses.

"[T]here is a presumption against the waiver of constitutional rights, and for a waiver to be effective it must be clearly established that there was an intentional relinquishment or abandonment of a known right or privilege."[159] There was no intentional relinquishment or abandonment by Appellant or his Counsel of his right to have these additional offenses properly charged, referred, presented to an Article 32 preliminary hearing, referred, or to be arraigned on these offenses. The Military Judge failed to engage in a waiver colloquy with Appellant inquiring as to any waiver of his right to an Article 32 proceeding or any of these due process rights.[160]

Civilian Defense Counsel said during the MRE 404(b) motion hearing that the defense "withdraws its original objection or motion, basis of defective notice; that's been cured, clearly. The remaining issue, of course, is the *Reynolds* and *Wright* tests that we've asked the court to exclude certain piece[s] of evidence."[161] However, he did not waive notice as to the later-proposed

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[158] *United States v. Reese*, 76 M.J. 297, 301 (C.A.A.F. 2017).
[159] *United States v. Girouard*, 70 M.J. 5, 10 (C.A.A.F. 2011) (citing *United States v. Harcrow*, 66 M.J. 154, 157 (C.A.A.F. 2008)).
[160] *See*, Article 32 Waiver Colloquy (2-7-8), Military Judges' Benchbook, www.jagcnet.army.mil/EBB/. There is only one colloquy with Appellant in the transcript on a waiver issue involving discovery (R. at 474-475 (Art. 39(a) of 16 May 2023).
[161] R. at 149 (Art. 39(a) of 20 December 2022).

use of the four new images as newly charged offenses; he merely waived his initial objection for defective notice under M.R.E. 404(b) for the Government's failure to articulate which exceptions under the Rule apply, which they cured in their subsequent filings before the Article 39(a) motions hearing. Having since received proper M.R.E. 404(b) *notice*, Civilian Defense Counsel waived that issue, and shifted his attention to the M.R.E. 404(b) analysis under *Reynolds* and *Wright*.

Similarly, Civilian Defense Counsel said, "[w]e don't intend to mount a challenge to say that it doesn't meet the specifications language of eight *images* because it's images on a single *document* or it's a *document*, a *PDF document*. We understand the Government has some latitude to carry its burden."[162] This is not a waiver of the number of offenses charged; he was considering whether a potential change from "images" (the charging language) to "document" or "PDF" to reflect the nature of the Hebes PDF not being an image was something he should object to. Civilian Defense Counsel later decided that the Government could get a variance instruction if that distinction in terms became an issue.[163]

Civilian Defense Counsel again says he and co-counsel considered arguing the PDF is "a *document* and not *images*, and they charged eight *images*, but then they could get a variance instruction and be done, so."[164] However, any waiver here is limited by the Civilian Defense Counsel's statements and understanding of what was being discussed. He mentioned a potential variance between a later finding by the members that may say Appellant wrongfully possessed a "PDF" or "document" instead of an "image," as Appellant had been charged with. However, the Defense did not waive a broader potential variance between the content (acts and individuals depicted) of the findings and the charged offenses. Likewise, the Military Judge did not signal to

[162] R. at 151 (emphasis added) (Art. 39(a) of 20 Dec 2022).
[163] R. at 153 (Art. 39(a) of 20 Dec 2022).
[164] R. at 158 (emphasis added).

him the need to amend the Charge Sheet based on R.C.M. 603 as a result of the Government's proposed major change to the Specification adding four images. A waiver of a potential variance in charged file types and file extensions does not encompass Appellate Defense Counsel's claim of a variance for the finding that Appellant possessed the specific Hebes PDF or "720d" image.

After the MRE 404(b) motions hearing, Civilian Defense Counsel sent an email to the Military Judge, and stated, "the defense withdraws its previous objection made on the record relating to evidence other than the NCMEC-identified images as eligible to prove the *elements* of the *charged offenses*."[165] Although at worst ambiguous as to what the Civilian Defense Counsel is referencing, and without covering the due process issues listed above, the Military Judge treated this email as having conceded to the Trial Counsel's proposal of adding uncharged misconduct as charged misconduct, agreeing that this can be accomplished without any additional due process, to include amending the Charge Sheet, and that these new offenses can just be added to the Findings Worksheet. The only support for this previously undiscovered process is the Government's "*res gestae*" argument, this alleged email concession for Civilian Defense Counsel, and an erroneous reliance on *United States v. Dow*.[166]

Nothing in this email or elsewhere in the Record stated that Civilian Defense Counsel intentionally relinquished Appellant's right to the due process protections afforded by R.C.M. 603. He likewise did not intentionally relinquish Appellant's right to an Article 32 hearing for these additional offenses, nor was Appellant asked about such a waiver on the Record. Furthermore, he did not purport to waive proper referral, nor did he or any of the parties have authority to refer charges. He simply waived the use of this evidence to prove the *elements* of the *charged*

[165] App. Ex. 25 at 2 (emphasis added) (E-mail string: U.S. v. Kelley – Continuance).
[166] *United States v. Dow*, No. ARMY 20200462, 2022 WL 2161607, at *2 (A. Ct. Crim. App. June 14, 2022).

offenses.[167] In essence, Civilian Defense Counsel merely recognized that, when properly applied, *res gestae* is a valid legal principle.[168]

The Military Judge then ruled on the defense's motion to exclude M.R.E. 404(b) evidence, denying the motion, but placing some limitations on the Government.[169] The Military Judge limited the scope of his ruling based on a misunderstanding of Civilian Defense Counsel's position:

> [O]n the record during the hearing on 20 December 2022, the Defense objected to the Government admitting images other than those images identified during the preliminary hearing to prove the charged offenses. Specifically, the Defense objected to the Government using images found on the "Hebes" .pdf document to prove the *charged offenses*. See AE XVI. This objection was based on insufficient notice - that the Government had identified only eight *images* at the preliminary hearing to prove the charged offenses and should be precluded from thereafter expanding the *scope* due to insufficient notice. The Defense then withdrew *this* objection in an email following the 20 December 2022 hearing. See AE 25.

Civilian Defense Counsel perhaps read this with emphasis on the word *images* in the context of his stated concerns about a potential variance between the words "images" and "PDF," discussed above. Perhaps the Military Judge wrote this with emphasis in his mind on the words *only eight* to imply that the *scope* of the number of images was expanding (ignoring all other issues). This is one example of what the Record illustrates frequently: the Civilian Defense Counsel and the Military Judge kept talking past one another throughout the trial. Some fault may lie with Civilian Defense Counsel for not verifying or seeking clarity. But ultimately, it is the Military Judge who is responsible for ensuring that "the dignity and decorum of the proceedings are maintained," and

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[167] App. Ex. 25 at 2 (emphasis added) (E-mail string: U.S. v. Kelley – Continuance).
[168] *United States v. St. Jean*, 83 M.J. 109, 112 (C.A.A.F. 2023) (citing *Black's Law Dictionary* 1565 (11th ed. 2019), the C.A.A.F. defined *res gestae* "as '[t]he events at issue, or other events contemporaneous with them.").
[169] App. Ex. XIX [emphasis added] (Military Judge's Ruling on Defense Motion to Exclude M.R.E. 404(b)).

for exercising "reasonable control over the proceedings to promote the purposes of [the Rules for Courts-Martial and the Manual for Courts-Martial]."[170]

Fast-forwarding a few months to the eve of trial, the Military Judge emailed the parties to inquire about the Findings Worksheet, saying:[171]


[redacted]

[172]

Civilian Defense Counsel later replied with the following:

[170] Rule for Courts-Martial 801(a), Manual for Courts-Martial (2019).
[171] App. Ex. 47 (Court's email re: Findings Worksheet).
[172] App. Ex. 47 (Military Judge's email of 11 May 23, subj, U.S. v. Kelley - Findings Worksheet).

 [173]

In response to this reply, the Military Judge said:

[173] App. Ex. 48 at 2 (CDC's email of 14 May 22, replying to MJ email at App. Ex. 47).

 [174]

The last correspondence from Civilian Defense Counsel on this email chain reads:

 [175]

As noted, the Military Judge did not engage in any discussion about how or why the Government was permitted to amend the Charge Sheet *de facto*, adding four images[176] to the eight charged images. What authority did the Court or Government have to list more and different images on the Findings Worksheet than what was charged and referred? This was an improper burden-shifting–the Military Judge erroneously put the burden on Appellant to disprove the Court's interpretation of his email and statements at the motions hearing. Rather than requiring the

[174] App. Ex. 48 at 1 (MJ's email of 14 May 22, responding to CDC's earlier reply in App. Ex. 48).
[175] App. Ex. 48 at 1 (CDC's email of 14 May 22, responding to MJ's earlier reply in App. Ex. 48).
[176] As noted above – Hebes.pdf includes at least eight images in a collage, plus the other 3 added images, plus the remaining seven of the eight noticed images.

Government to abide by Constitutional due process and R.C.M. 603, the Military Judge required the defense to try to disprove the Court's erroneous interpretation of his email and statements during the motions hearing.

The Government wanted Hebes PDF to be considered as a new offense because the depicted images were much more damming,[177] and the Government said there were more indicia of possession and control over that file than the eight charged images.[178] Rather than fully reviewing and assessing the evidence prior to preferral, or following the correct, albeit slower, process of withdrawing and re-preferring (or charging separately), the Government tried to find a short-cut with the Findings Worksheet. In so doing, the Government was able to back-door the eight worst child pornography images into the trial, which they had in their possession since before preferral. The Government increased the quantity and quality of their charges, and bolstered their chances of success with evidence that had more indicia of access and control. They did so erroneously without withdrawing, amending, re-preferring, or referring anew the Charge Sheet.

At the start of trial, the Military Judge recapped the R.C.M. 802 sessions, noting his M.R.E. 404(b) ruling at App. Ex. XIX, and he highlighted Civilian Defense Counsel's above email of 14 May 2023 "about notice concerning what images would go to the members in support of the charges."[179] The Military Judge continued, saying:

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[177] R. at 74 (Art. 39(a) of 21 May 2023) (Civilian Defense Counsel said on closing argument in reference to the Hebes.pdf, "it is disgusting. It is the only obvious child pornography in this case. It's got like little kids, and its bad.").
[178] R. at 116 (Gov. rebuttal) ("[T]he Hebes PDF had to have been opened to have been created into the cache, to have been created into a thumbnail."); App. Ex. XVII at 7 (Gov. Resp. to Def. Motion to Exclude MRE 404(b) of 13Dec22) ("Through testimony, the Government will be able to provide that the location that the Hebes.pdf was found in the "Downloads" folder of the Accused's personal cell phone, which requires action by the user to open, view, and download the document onto their phone.").
[179] R. at 21 (Art. 39(a) session of 15 May 2023).

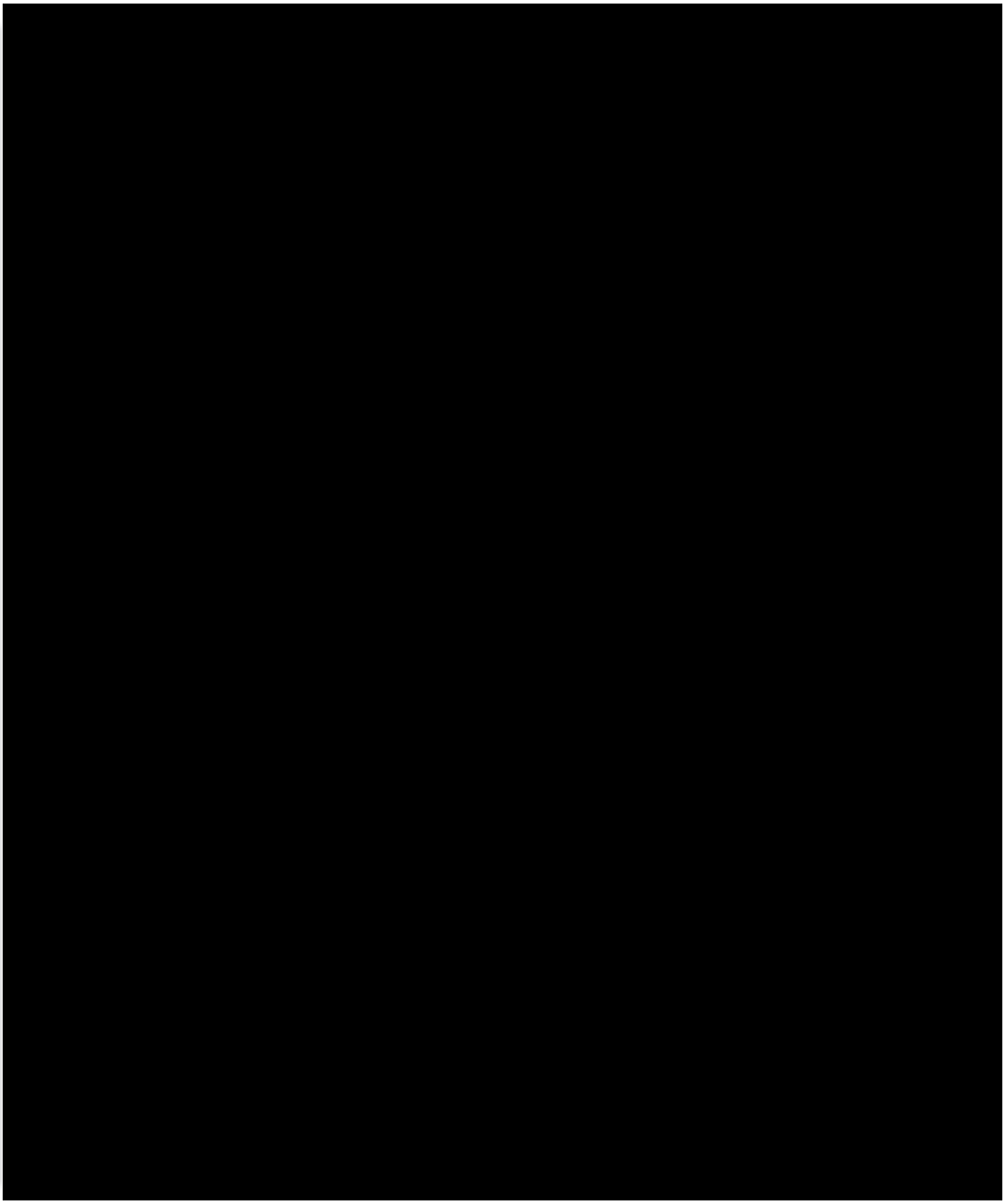
> [I]n the court's ruling on the M.R.E. 404(b) motion, the court noted that this issue of notice had come up during the hearing back in December on the *M.R.E. 404(b) motion*, the continuation was granted to enable the defense to prepare for additional images that will be offered *in support of the charges* in addition to those that were originally noticed during the Article 32 hearing.[180]

To Civilian Defense Counsel, the Military Judge might have been saying that he ruled to admit certain evidence under M.R.E. 404(b) over defense's 404(b) objections in support of the charges in addition to the evidence that was noticed at the Article 32 hearing. That is what M.R.E. 404(b) evidence is – it supports the existing evidence and charges while protecting the accused from improper propensity purposes. Civilian Defense Counsel may have disagreed with the ruling, but there was nothing else to object to at this stage.

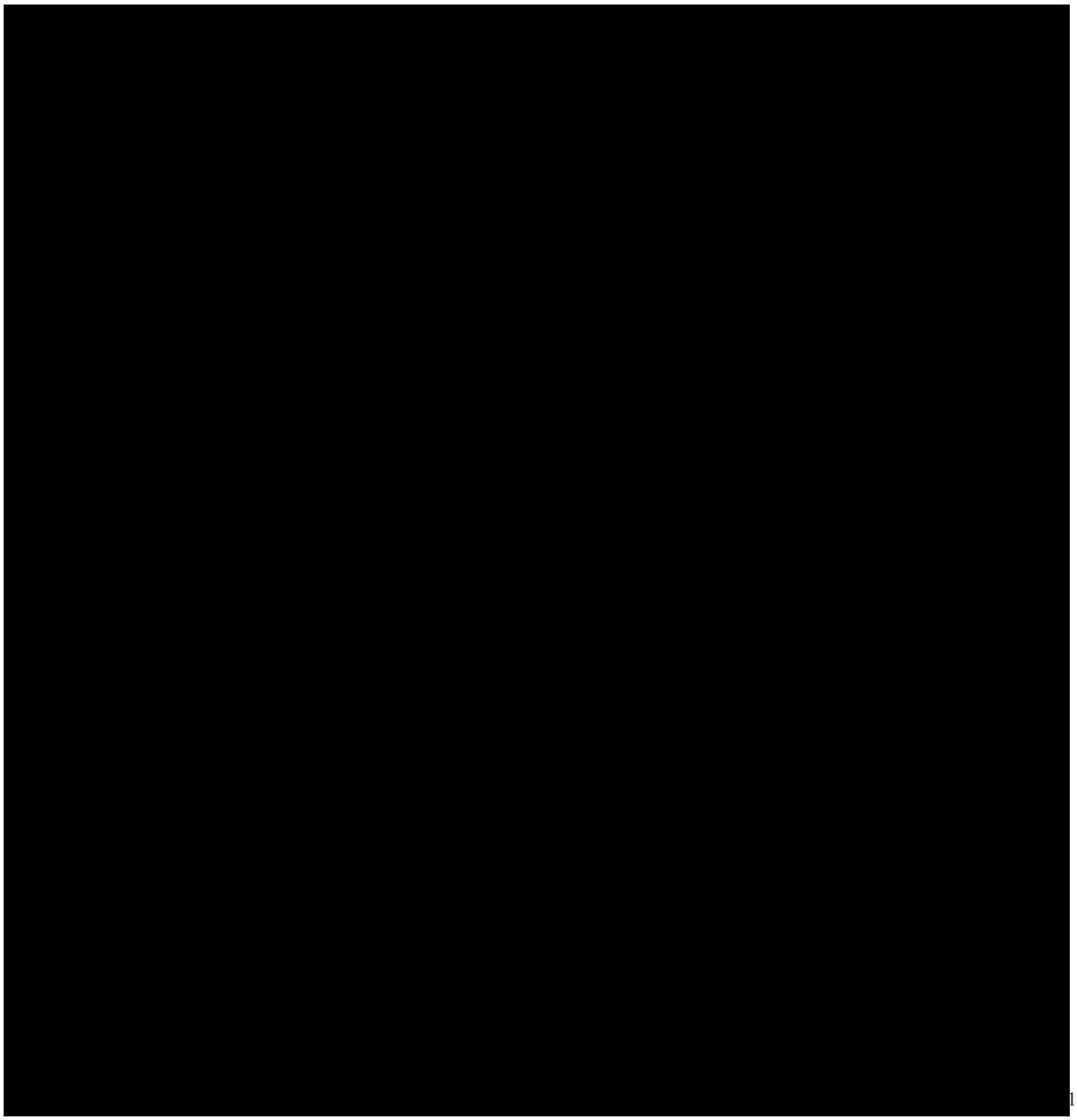
The following day during another recap of R.C.M. 802 sessions, the Military Judge mentioned the Findings Worksheet and again brought up *United States v. Dow*,[181] citing his email in App. Ex. 47. The Military Judge asked, "[i]s there a meeting of the minds between defense and trial counsel on what images trial counsel will offer to the members, that they believe constitute child pornography?"[182] Civilian Defense Counsel replied, saying "we have reviewed the 11 identified images. We have no issues with those. And we are tracking after comparing them."[183] This discussion is not a waiver of a *de facto* amendment to the Charge Sheet at this late stage or of the Government's proposed use of this evidence. Civilian Defense Counsel previously objected and was told the Military Judge already ruled on that issue against him. As discussed above, the Military Judge misunderstood Civilian Defense Counsel's email and objection at the MRE 404(b) motions hearing. Civilian Defense Counsel preserved the issue, then had to deal with the Military

[180] R. at 21 (emphasis added) (Art. 39(a) session of 15 May 2023).
[181] *United States v. Dow*, No. ARMY 20200462, 2022 WL 2161607, at *2 (A. Ct. Crim. App. June 14, 2022).
[182] R. at 470 (Art. 39(a) session of 16 May 2023, recapping prior R.C.M. 802 conferences).
[183] R. at 470 (Art. 39(a) session of 16 May 2023, recapping prior R.C.M. 802 conferences).

Judge's erroneous ruling. He is not required to continue objecting over the ruling, and he continued to walk through the trial process. At that point, Civilian Defense Counsel is merely discussing "some details on format" [184] for what the members will see, in coordination with Trial Counsel.

 [185]

[184] R. at 470 (Art. 39(a) session of 16 May 2023, recapping prior R.C.M. 802 conferences).
[185] R. at 471 (Art. 39(a) session of 16 May 2023, recapping prior R.C.M. 802 conferences).

 [186]

Significantly, when the evidence is later presented at trial, Civilian Defense Counsel requested an M.R.E 404(b) instruction.[187] Trial Counsel responded, saying the Military Judge ruled those images "were part of *res gestae* as well as it – defense counsel conceded that those images are…" and then the Military Judge excused the members to discuss the issue outside their

[186] R. at 472 (Art. 39(a) session of 16 May 2023, recapping prior R.C.M. 802 conferences).
[187] R. at 913 (Art. 39(a) session of 18 May 2023 – Direct exam of CGIS S/A V.). CDC asks the Court to give its MRE 404(b) instruction with regards to PE-12 (CD-4, sealed, contains "Image 720d") and PE-13 (CD-5, sealed).

presence.[188] The Military Judge stated, "Defense conceded that images found on the phone are *res gestae* other than those being offered." Civilian Defense Counsel replied, "well, then if we're making [an objection under M.R.E.] 404(b), Your Honor, here's the 403 objection from the defense…"[189] The Military Judge was restating his prior M.R.E 404(b) ruling. Civilian Defense Counsel was again not required to continue objecting following the Military Judge's recapitulation of his ruling. Furthermore, *res gestae* does not permit the Government to add images to the Specification. It is an evidentiary principle which may permit the evidence to be admitted to give context and help prove the charged offenses, but not add new ones.

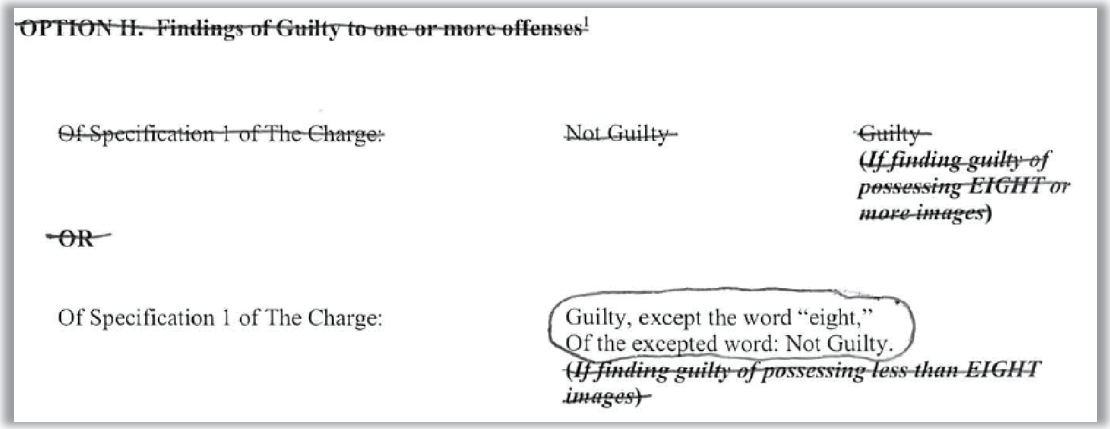
Before deliberations, the Military Judge instructed the members on the Findings Worksheet[190] to select "guilty" to Specification 1 if the members find Appellant guilty of possessing "eight *or more* images."[191] Appellant was only ever charged with eight images, and the Charge Sheet was never amended. Not only is the Government providing a menu of eleven images to prove eight, but the Military Judge erroneously instructed the members that they could find Appellant guilty of possessing more than eight images. Although he was not convicted of more than eight, this evinces the Court and Government's erroneous belief that they had *de facto* amended the charge sheet again. The first *de facto* change was arguably after the Article 32 preliminary hearing to identify the eight images, as no Bill of Particulars was issued. The Court now believes the second *de facto* amendment now reflected eleven images (including 4 new

[188] R. at 914 (Art. 39(a) session of 18 May 2023); see also, App. Ex. 105 (Findings Worksheet – also stating "eight *or more* images").
[189] R. at 916 (Art. 39(a) session of 18 May 2023).
[190] R. at 121 (Art. 39(a) of 21 May 2023); *see also*, App. Ex. 101 (Instructions on Findings Worksheet).
[191]

images post-referral), without the other due process to which Appellant was entitled, including proper preferral, referral, Article 32, and Article 34 advice to the Convening Authority.


[redacted]

192


~~OPTION II. Findings of Guilty to one or more offenses~~[1]

~~Of Specification 1 of The Charge:~~	~~Not Guilty~~	~~Guilty~~ ~~(*If finding guilty of possessing EIGHT or more images*)~~
~~OR~~		
Of Specification 1 of The Charge:	Guilty, except the word "eight," Of the excepted word: Not Guilty. ~~(*If finding guilty of possessing less than EIGHT images*)~~	

193

Conclusion

This Court should follow R.C.M. 603, and the two-prong analysis in *Ballan* to conclude that the additional images resulting in convictions were not properly referred to this court-martial. However, because these offenses were never referred to this Court-Martial, under *Reese,* the Court

[192] R. at 121 (Art. 39(a) of 21 May 2023); *see also*, App. Ex. 101 (Instructions on Findings Worksheet).
[193] App. Ex. 105 at 1.

should not conduct a prejudice analysis because the lower Court lacked jurisdiction over these offenses. Therefore, this Court must set aside the findings of guilt in this matter.

IV.

THE MEMBERS' FINDINGS CONSTITUTED A FATAL VARIANCE OF SPECIFICATION 1.

Standard of Review

Material variance is reviewed *de novo* when the issue has been preserved.[194]

Law and Analysis

"From the earliest days of [the CAAF], we have held that to prevail on a fatal variance claim, an appellant must show both that the variance was material and that he was substantially prejudiced thereby."[195] Likewise, the CAAF has stated, "[a] variance that is 'material' is one that, for instance, substantially changes the nature of the offense, increases the seriousness of the offense, or increases the punishment of the offense."[196] Further, "[a] variance can prejudice an appellant by (1) putting 'him at risk of another prosecution for the same conduct,' (2) misleading him 'to the extent that he has been unable adequately to prepare for trial,' or (3) denying him 'the opportunity to defend against the charge'" [emphasis added].[197]

A. There is a variance between Specification 1 of the Charge, and the member's findings.

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[194] *United States v. Marshall*, 67 M.J. 418, 419 (C.A.A.F. 2009), *aff'd,* (C.A.A.F. Jan. 15, 2010); *see also*, *United States v. Finch*, 64 M.J. 118, 121 (C.A.A.F. 2006) (applying a plain error standard when there is a waiver).

[195] *United States v. Marshall*, 67 M.J. 418, 420 (C.A.A.F. 2009), *aff'd*, (C.A.A.F. Jan. 15, 2010) (citing *United States v. Finch,* 64 M.J. 118, 121 (C.A.A.F.2006); *United States v. Hunt,* 37 M.J. 344, 347 (C.M.A.1993); *United States v. Lee,* 1 M.J. 15, 16 (C.M.A.1975); *United States v. Hopf,* 1 C.M.A. 584, 586–87, 5 C.M.R. 12, 14–15 (1952)).

[196] *Id*. (citing *Finch,* 64 M.J. at 121; *see also*, *United States v. Teffeau,* 58 M.J. 62, 66 (C.A.A.F.2003)).

[197] *Id*. (citing *Teffeau,* 58 M.J. at 67).

Appellant was convicted of Specification 1 of the Charge for possessing two images of child pornography, "Hebes.pdf," and "Image 720d."[198] Although these images[199] ultimately appeared on the Findings Worksheet,[200] they were not identified in the Specification, nor were they part of the original eight noticed images that served as the basis for the specification.[201]

As noted above, only seven of the original eight noticed images were included on the Findings Worksheet.[202] Four images were added,[203] totaling eleven named images on the Findings Worksheet, even though only eight were charged.[204]

There is discussion in the record during the Art. 39(a) oral argument session litigating Civilian Defense Counsel's MRE 404(b) motion regarding these additional images, and in general surrounding the Government's evolving position with respect to these images.[205] Nonetheless, how these images went from being anticipated MRE 404(b) material to something on the Findings Worksheet for which Appellant could be (and ultimately was) convicted, is still puzzling. The

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[198] Convening Authority's Action and Entry of Judgment at 3; App. Ex. 105 at 3 (Findings Worksheet).
[199] The "Hebes.pdf" is actually a file, not a single image as Civilian Defense Counsel noted.
[200] App. Ex. 105 at 3.
[201] Art. 32 Report at 1; Audio Recording of Art. 32 Preliminary Hearing at timestamp 26:14-26:35 (emphasis added).
[202] These included: Image 331, Image 758, Image 842, Image 4283, Image 4302, Image 7747, and Image 1593. These images constituted items 4, 5, 6, 8, 9, 10, and 11 on the Findings Worksheet (App. Ex. 105 at 3). The Record is unclear as to why eight were charged, but only seven of those were listed on the Findings Worksheet.
[203] These included: Hebes.pdf (convicted), Image 720d (convicted), Image 85d5, and Image 296. These images constituted items 1, 2, 3, and 7 on the Findings Worksheet (App. Ex. 105 at 3).
[204] Charge Sheet. As noted elsewhere in this brief, the "Hebes.pdf" contained at least eight images of child pornography. Those eight, plus the other added three equals eleven additional, uncharged images that went to the members for their determination on findings, in addition to the seven remaining charged images, totaling eighteen images on which the members were permitted to make findings.
[205] *See, e.g.*, R. at 43-49 (Art. 39(a) of 20 December 2022 – Oral Argument on Trial Defense Counsel's motion to exclude M.R.E. 404(b) evidence); App. Ex. XIV – XIX (Def. Motion to Exclude MRE 404(b), Gov. responses, and Military Judge's Ruling).

charges were never withdrawn, amended, re-preferred, referred anew, or sent to Article 32 hearing. There was no second Preliminary Hearing Officer opinion as to probable cause, and consequently no Article 34 advice to the Convening Authority for the four additional offenses. These facts present significant due process and related concerns addressed in other assignments of error. Apart from those issues, there is also a variance between what Appellant was initially noticed and charged with,[206] and what he was ultimately convicted of.[207]

B. This variance is material because these images alleged additional ***offenses*** that were never charged or referred anew to this Court-Martial, which substantially changed the nature of the offense, and increased the seriousness of the offense.

As noted above, the members went from considering eight images based on the specification to eighteen when asked to make their findings. The eight additional images embedded in the Hebes PDF collage alone depicted the most egregious forms of child exploitation – these were the worst images, and the most prejudicial to Appellant. Civilian Defense Counsel said on closing argument in reference to the Hebes PDF, "it is disgusting. It is the only obvious child pornography in this case. It's got like little kids, and its bad."[208]

Indeed, the images in the Hebes PDF are shocking. It appears to depict small children (under age [redacted] engaging in sexual acts with adults and other children. This is far more prejudicial than the charged images, which among them include a strange series of pictures depicting a topless

[206] Charge Sheet; Art. 32 Report at 1; Audio Recording of Art. 32 Preliminary Hearing at timestamp 26:14-26:35 (emphasis added).
[207] R. at 150 (Art. 39(a) of 20 Dec 22 – announcement of findings (second time); App. Ex. 105 (Findings Worksheet); Entry of Judgment at 3.
[208] R. at 74 (Art. 39(a) of 21 May 2023).

[redacted] year-old on a motorbike, or the images of post-pubescent teens or young adults that are questionably legal, such as Image 852d and 720d.[209]

The charged images largely fell into the wheelhouse of the questionably legal and criminally strange, while the Hebes PDF fell squarely into the worst possible category of child sexual abuse material. These additional offenses increased the seriousness of the offense by far. They also changed the nature of the offense – not in terms of the charged Article (both were Article 134 – child pornography), but the nature of the preparation required to defend against this type of material.

C. The additional offenses misled Appellant and his Trial Defense team to the extent that he has been unable adequately to prepare for trial, and been denied the opportunity to defend against the charge.

Leading up to trial, it was unclear how these additional images were going to be used by the Government.[210] Even during trial, Appellant's trial defense team thought that the additional images would be used either as MRE 404(b) evidence, or as *res gestae* to prove the elements of the charged offenses.[211] Neither the Military Judge nor the Government ever put the defense on notice that they intended to modify the Charge, properly under R.C.M. 603, or *de facto*. Had the

[209] R. at 78 (Art. 39(a) of 19 May 2023) (Cross Examination of Dr. [redacted] (The Government's medical expert admitted that, based on Image 720d alone, he is not comfortable identifying the individual in that image as a minor); *see also*, R. at 923 (Art. 39(a) of 18 May 2023) (Where on cross examination, Special Agent [redacted] described the woman in "Image 720d" as "possibly minor" in terms of her age); App. Ex. 110 at 14 (Def. Post-Trial Motion for Appropriate Relief).
[210] R. at 127-128 (Art. 39(a) of 20 December 2022) ("but I guess that's an area where even the defense is confused at this point, as to how this evidence is going to appear at trial.").
[211] R. at 913 (Art. 39(a) session of 18 May 2023 – Direct exam of CGIS S/A V.). CDC asks the Court to give its MRE 404(b) instruction with regards to PE-12 (CD-4, sealed, contains "Image 720d") and PE-13 (CD-5, sealed). If Civilian Defense Counsel understood that Image 720d was part of an amended charge, or the charge itself, he would have had no reason to request an MRE 404(b) limiting instruction.

defense been on notice as to an amended Charge Sheet, he would have understood the purpose for which these images were being offered, and might have changed defense tactics or preparation.

Appellant provided a sworn affidavit and testimony in this case, which is somewhat unusual in criminal trials. The defense tactics in defending an accused that merely wanted to access young adult (but legal) pornography, versus one who seeks out the worst possible form of CSAM are fundamentally different. You are either presenting the client as a hapless wanderer of the internet, or maybe as someone who has struggled with mental health and addiction in various forms over the years, including his addiction to illicit pornography.

Just because Civilian Defense Counsel asked for and ultimately received additional time does not mean Appellant was permitted to defend against the additional offenses at trial. There is the technical side to defense preparation – meeting with expert witnesses, reviewing evidence, preparing an opening and closing, etc. More time for technical preparation can remedy some issues. Then there is the strategic side of defense preparation. The bulk of Civilian Defense Counsel's pre-trial preparation and defense theory centered on this evidence being used as MRE 404(b) evidence, or as evidence to prove the mens rea or other *elements of the eight charged images,* not as new charged offenses.[212]

When the Government or Military Judge moves the goal posts, every motion, every request, every action that has already taken place could suddenly have been counter-productive to the new defense theory that becomes necessary in light of the Government's evolving charges. This is why major changes are not permitted after referral.[213] Arraignment and entry of pleas soon

[212] App. Ex. XIV (Def. Motion to Exclude MRE 404(b) of 28 Sep 22); App. Ex. XVI.
[213] Rule for Courts-Martial 603, Manual for Courts-Martial (2024 ed.).

follows referral, and an accused may wish to negotiate, litigate, or plead differently at those stages if the charges are different.

Marshall identifies three ways in which an Appellant "*can"* show prejudice, implying that this three-prong approach is not dispositive.[214] The material variance was also prejudicial because it violated due process. Appellant's denial of due process is addressed in Issue II. Furthermore, the variance was prejudicial because it resulted from offenses were never referred. As such, the trial Court's lack of jurisdiction is discussed in Issue III. Prejudice analysis under *Marshall* for fatal variance also considers the Defense's strategy,[215] discussed in Issue VI.

Conclusion

The members' findings of guilt in Specification 1 constitute a fatal variance from the Charge Sheet because Appellant was never charged with knowingly and wrongfully possessing "Hebes.pdf" or "Image 720d." As such the findings must be set aside with prejudice.

V.

THE MILITARY JUDGE ERRONEOUSLY FAILED TO CONDUCT A PROPER INQUIRY INTO THE PANEL MEMBERS' QUESTIONS (CLARIFYING THAT THEY ACQUITTED AFTER THEIR INITIAL VOTE ON BOTH SPECIFICATIONS), AND IMPROPERLY INSTRUCTED THE MEMBERS REGARDING VOTING PROCEDURES.

Standard of Review

The question of whether the panel was properly instructed is a question of law, and thus, review is *de novo*.[216]

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[214] *Marshall*, 67 M.J. at 420.
[215] *United States v. Treat*, 73 M.J. 331 (C.A.A.F. 2014).
[216] *United States v. Williams*, No. 202100006, 2022 WL 1565320, at *4 (N-M. Ct. Crim. App. May 18, 2022), *review denied*, 83 M.J. 103 (C.A.A.F. 2022), citing *United States v. McDonald*, 57 M.J. 18, 20 (C.A.A.F. 2002); *see also*, *United States v. Garner*, 71 M.J. 430, 432 (C.A.A.F.

Law and Analysis

The Military Judge has an independent duty to determine and deliver appropriate instructions.[217] In regard to form, a military judge has wide discretion in choosing the instructions to give but has a duty to provide an accurate, complete, and intelligible statement of the law.[218] Failure to provide correct and complete instructions to the panel before deliberations begin may amount to a denial of due process.[219] Furthermore, it is the responsibility of military judges to ensure that any ambiguities in findings are clarified before the findings are announced, and if they fail to do so, the appellate courts cannot rectify that error.[220]

Here, the Military Judge erroneously re-instructed the panel on standard voting procedures, after they stated they informed the Court that they had "voted on both specs. but we don't have ¾ majority on any individual files."[221] This question informed the Court that a vote had taken place, and the results of that vote – a full acquittal. But because the members "weren't clear on how to come to consensus on each file (page 3 of 3). or if that is required," the Military Judge later found that there was "significant ambiguity about the nature of the question and where in the deliberative process the members were at the time of the question."[222]

> At that point [of ambiguity], the military judge should have confirmed with the panel president whether the panel formally voted on each of the three specifications of [the Charge]. Doing so could have been accomplished without disclosing the results of the vote on each specification and would also have provided complete

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2013) (citing *United States v. Ober,* 66 M.J. 393, 405 (C.A.A.F.2008)); *United States v. Smith*, 68 M.J. 316, 319 (C.A.A.F. 2010); *United States v. Wolford*, 62 M.J. 418, 422 (C.A.A.F. 2006).

[217] *United States v. Westmoreland*, 31 M.J. 160, 163-64 (C.M.A. 1990); *United States v. Garner*, 71 M.J. 430 (C.A.A.F. 2013); *United States v. Barnett*, 71 M.J. 248 (C.A.A.F. 2012).

[218] *United States v. Behenna*, 71 M.J. 228 (C.A.A.F. 2012).

[219] *United States v. Wolford*, 62 M.J. 418, 419 (C.A.A.F. 2006), citing, *United States v. Jackson,* 6 M.J. 116, 117 (C.M.A.1979).

[220] *United States v. Augspurger*, 61 M.J. 189 (C.A.A.F. 2005).

[221] App. Ex. 107 (Member Statement indicating they voted).

[222] App. Ex. 119 at 7 (Amended Ruling on Def. Post-Trial Motion for Appropriate Relief).

> information to the military judge, and the parties, in determining how to further instruct the panel.[223]

As the Army Court of Criminal Appeals stated in *Reyes-Lesmes*, it was the Military Judge's job to clear up any ambiguity, which he failed to do.[224]

> Prior to the announcement of findings in open court, "[t]he military judge may, in the presence of the parties, examine any writing which the president intends to read to announce the findings and may assist the members in putting the findings in proper form." R.C.M. 921(d). Our superior court has made it clear that it is the responsibility of the military judge to ensure that any ambiguities or deficiencies in a court-martial's findings "are clarified before the findings are announced." *United States v. Augspurger*, 61 M.J. 189, 193 (C.A.A.F. 2005). This can be accomplished by "ask[ing] the members to clarify their findings" prior to the announcement. *Id.* at 192. A military judge's failure to clarify ambiguous or defective findings may result in error that cannot be rectified by an appellate court. *(citations omitted).*[225]

Nonetheless, the panel President himself tried to clear up the confusion, but when he attempted to ask the Military Judge a question, the Military Judge refused to let him ask.[226] The Military Judge erroneously failed to clear up this significant ambiguity before providing further instructions to the members.

Without the benefit of first clarifying any ambiguity, the Military Judge then sought to instruct the members. Civilian Defense Counsel stated he "would not object" with the Military Judge's proposed re-instruction on standard voting procedures, which they had previously received.[227] However, he also said moments before, "I do agree with the Court that they have

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[223] *United States v. Reyes-Lesmes*, No. ARMY 20180396, 2020 WL 6533831, at *5 (A. Ct. Crim. App. Nov. 4, 2020).
[224] App. Ex. 119 at 5 (Amended Ruling on Def. Post-Trial Motion for Appropriate Relief). The Military Judge based this decision on authorities such as R.C.M. 923, M.R.E 606(b), and *United States v. Loving,* 41 M.J. 213, 235-239 (C.A.A.F. 1994), stating that inquiry into the members' deliberative process is normally prohibited.
[225] *United States v. Reyes-Lesmes*, No. ARMY 20180396, 2020 WL 6533831, at *5 (A. Ct. Crim. App. Nov. 4, 2020).
[226] R. at 143.
[227] R. at 141 (Art. 39(a) of 21 May 2023).

indicated they've already voted, so we can't simply have them go back and say--a normal clarification will not resolve this."[228] He also discussed an unspecified CAAF case saying the "Military Judge may take steps to correct an issue like this through entry of a finding of not guilty." Thus, any waiver of this instruction was predicated on his belief that the Military Judge's instruction would lead the members to effectuate the vote that they already informed the Court they had taken – their vote to acquit.

Furthermore, when the members did not return a verdict equivalent to their prior vote to acquit, the Military Judge erroneously failed to clarify the ambiguity, and re-instruct the members on reconsideration procedures. The Defense did not waive any error for this failure to properly instruct, as discussed in Issue VI. The Defense did not waive any error for this failure to properly instruct, as he made an oral, then written, motion for appropriate relief asking the Court to set aside the findings of guilty.[229] During his oral motion, Civilian Defense Counsel stated,

> And that despite the judge's instructions and contrary to the judge's instructions, they essentially re-voted, which was not your instruction to do. Their note says they have voted. And it says that they have reached a result. And they've gone back and voted again.[230]

While there is an affirmative statement by Civilian Defense Counsel regarding the first of these two instructions,[231] that statement was predicated on a belief that implementation of the vote to acquit would follow the instruction. In the same breath, the Military Judge found that "neither party objected to the proposed instructions," while also finding that he "did not specifically rule on the Defense's proposed way ahead."[232] The Military Judge directly acknowledged that Civilian

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[228] R. at 140.
[229] App. Ex. 110 (Def. Post-Trial Motion for Appropriate Relief); R. at 152 (Art. 39(a) of 21 May 2023).
[230] R. at 152-153 (Art. 39(a) of 21 May 2023).
[231] R. at 141 (Art. 39(a) of 21 May 2023).
[232] App. Ex. 119 at 4 (Amended Ruling on Def. Motion for Appropriate Relief).

Defense Counsel proposed a different course of action which he did not rule on. That is an acknowledgment by the Military Judge that Civilian Defense Counsel did not waive this issue. These findings conflict, and are clearly erroneous. These erroneous findings tainted the Military Judge's conclusions of law because his analysis of a reconsideration vote is based in part on his earlier erroneous instruction on standard voting procedures, for which he admittedly "did not rule on the Defense's way ahead."[233] Therefore, this Court should disregard any waiver of this instruction, and review both instructions *de novo*.[234]

The Military Judge's ruling found that he "reread the instruction concerning the reconsideration *procedure*"[235] which appear to be drafted from the Procedural Instructions on Findings (2-5-14) from the Military Judges' Benchbook.[236] However, the Military Judge did not find nor did he provide the Reconsideration Instruction on Findings (2-7-14)[237] to the members, or state that they ever asked for reconsideration instructions. The Reconsideration Instruction incorporates the requirements of Rule for Courts-Martial 924 and Article 52, UCMJ, which provide specific procedures for when and how reconsideration may be conducted.

The Military Judge discussed his intended instruction with Trial and Defense Counsel:[238]

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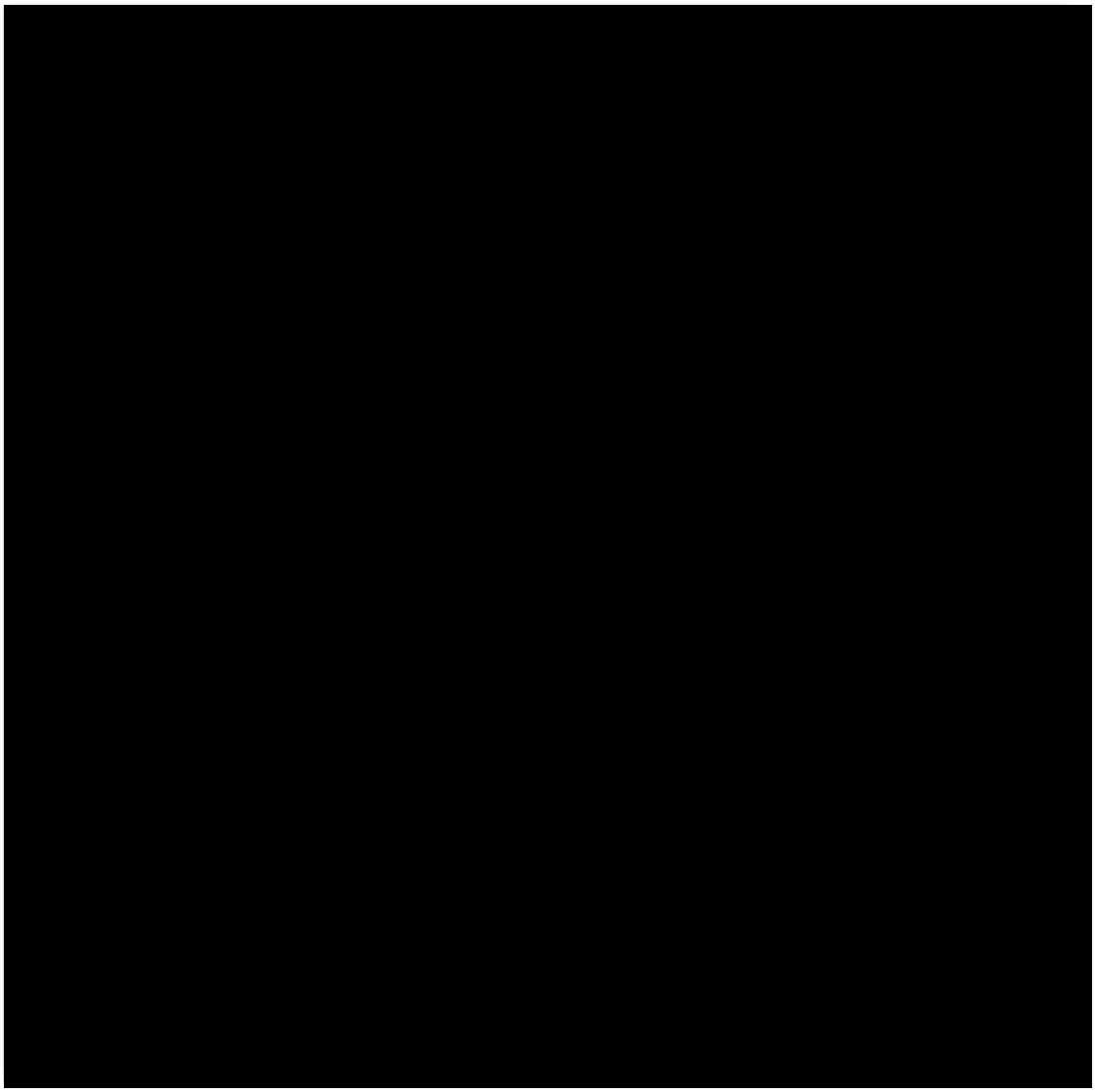
[233] App. Ex. 119 at 4 (Amended Ruling on Def. Motion for Appropriate Relief).
[234] *United States v. Wolford*, 62 M.J. 418, 420 (C.A.A.F. 2006), citing, *United States v. Smith,* 50 M.J. 451, 455–56 (C.A.A.F.1999), and *United States v. Mundy,* 2 C.M.A. 500, 502 (1953).
[235] App. Ex. 119 at 4 (finding 20) (emphasis added).
[236] Military Judges' Benchbook, www.jagcnet.army.mil/EBB/
[237] Military Judges' Benchbook, www.jagcnet.army.mil/EBB/.
[238] R. at 141 (Ar.t 39(a) of 21 May 2022).



Prior to the Military Judge reading his proposed instruction, Trial Defense Counsel consistently objected to the idea of re-instructing the Members, as they had already announced their vote.[239] The Military Judge twice re-instructed the Members on standard voting procedures. This instruction included guidance on reconsideration, which required the Members to open the Court and announce reconsideration, and to seek further guidance from the Military Judge should they chose to reconsider their vote.[240]

[239] R. at 137-140.
[240] R. at 143.

The panel President indicated that something was unclear to him, but the Military Judge did not permit him to ask the question.[241] The Military Judge sent the Members back for further deliberation, after which the Members came back with an incomplete findings worksheet, and the Military Judge then had to further instruct the President on how to complete the form.[242] After that, the Members returned and had again voted, this time resulting in a conviction for Specification 1.[243] At no point did the Members open the Court to ask to reconsider their original vote or for further instructions on reconsideration.[244]

A. The Military Judge's erroneous instructions were not harmless beyond a reasonable doubt.

"If instructional error is found, because there are constitutional dimensions at play, [Appellant's] claims 'must be tested for prejudice under the standard of harmless beyond a reasonable doubt.'"[245] "The inquiry for determining whether constitutional error is harmless beyond a reasonable doubt is 'whether, *beyond a reasonable doubt*, the error did not *contribute to* the defendant's conviction or sentence.'"[246]

These instructional errors absolutely contributed to, if not directly caused, Appellant's convictions. If the Military Judge had clarified the panel President's question before initially re-instructing the Members, he could have confirmed whether or not the members acquitted, had questions about voting, reconsideration, filling out the Findings Worksheet, or otherwise. He refused to answer the panel President's question[247] at the crucial juncture after they "voted on both

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[241] R. at 143.
[242] R. at 148.
[243] R. at 150.
[244] R. at 142-151.
[245] *United States v. Wolford*, 62 M.J. 418, 420 (C.A.A.F. 2006), citing *United States v. Kreutzer,* 61 M.J. 293, 298 (C.A.A.F.2005).
[246] *Id.* (quoting *United States v. Kaiser,* 58 M.J. 146, 149 (C.A.A.F.2003) (emphasis added)).
[247] R. at 143.

specs. but [stated] we don't have ¾ majority on any individual files."[248] Then he failed to ask clarifying questions himself after the second vote was clearly contrary to the first. Then he failed to re-instruct the members on reconsideration, if responses to the clarifying questions he failed to ask would have necessitated that.

Conclusion

This Court should set aside the findings with prejudice because the Military Judge's erroneous instructions were not harmless beyond a reasonable doubt.

VI.

APPELLANT RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS COUNSEL FAILED TO CLEARLY ASSERT AND MAINTAIN OBJECTIONS TO THE MILITARY JUDGE'S ERRONEOUS INSTRUCTIONS TO THE PANEL, AND TO THE MILITARY JUDGE ALLOWING ADDITIONAL OFFENSES TO BE CONSIDERED AS PART OF SPECIFICATION 1.

Standard of Review

"In reviewing for ineffectiveness, th[is] Court looks at questions of deficient performance and prejudice de novo."[249]

Law and Analysis

The CAAF recently had occasion to again consider the law as it pertains to ineffective assistance of counsel. In *United States v. Metz,*[250] the CAAF outlined the law as follows:

> The Supreme Court has distinguished two components essential for establishing ineffectiveness of counsel. First, an appellant must show that counsel's performance was deficient. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). "This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment."

[248] App. Ex. 107 (Member Statement indicating they voted).
[249] *United States v. Datavs*, 71 M.J. 420, 424 (C.A.A.F. 2012) (internal quotation marks omitted) (quoting *United States v. Gutierrez*, 66 M.J. 329, 330-31 (C.A.A.F. 2008)).
[250] *United States v. Metz*, __ M.J. __ , Crim. App. No. 201900089 (C.A.A.F., June 20, 2024).

> *Id.* Second, an appellant must show that counsel's deficient performance resulted in prejudice. *Id.* "This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.* An appellant must prove that defense counsel's performance "fell below an objective standard of reasonableness." *Id.* at 688. "In any case presenting an ineffectiveness claim, the performance inquiry must be whether counsel's assistance was reasonable considering all the circum-stances." *Id*. Scrutiny of counsel's performance should be highly deferential. *Id*. at 689. The court must assess "the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." *Id*. at 690…if deficient performance is established, to demonstrate prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694.

However, Courts of appeal cannot review waived issues absent ineffective assistance of counsel.[251]

> Waiver is the 'intentional relinquishment or abandonment of a known right.' 'Whether a particular right is waivable; whether the defendant must participate personally in the waiver; whether certain procedures are required for waiver; and whether the defendant's choice must be particularly informed or voluntary, all depend on the right at stake.'[252]

"[A] waiver is a *deliberate decision* not to present a ground for relief that might be available in the law."[253] "[T]here is a presumption against the waiver of constitutional rights, and for a waiver to be effective it must be clearly established that there was an *intentional relinquishment or abandonment of a known right or privilege*" [emphasis added].[254]

Appellant's claim of ineffective assistance of counsel can be broadly characterized as his counsel's failure to ensure he received due process throughout his court-martial. The lack of due

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[251] *United States v. Day*, 83 M.J. 53 (C.A.A.F. 2022); *see also United States v. Blackburn*, 80 M.J. 205 (C.A.A.F. 2020); *United States v. Rich*, 79 M.J. 472 (C.A.A.F 2020); *United States v. Davis*, 79 M.J. 329 (C.A.A.F. 2020).

[252] *United States v. Girouard*, 70 M.J. 5, 10 (C.A.A.F. 2011) (citing *United States v. Harcrow*, 66 M.J. 154, 156 (C.A.A.F.2008)); *United States v. Olano,* 507 U.S. 725 (1993).

[253] *United States v. Campos*, 67 M.J. 330 (C.A.A.F. 2009); *see United States v. Gladue*, 67 M.J. 311, 313 (C.A.A.F. 2009), for a discussion of the difference between waived and forfeited issues.

[254] *Id*. (citing *Harcrow,* 66 M.J. at 157).

process that Appellant received is directly addressed in Issue II. Two examples of Trial Defense Counsel's conduct that fall into this broader category are discussed below. However,

> A judge is ultimately responsible for the control of his or her court and the trial proceedings (citations omitted). Proper case management during a trial, necessary for the protection of an accused's due process rights and the effective administration of justice, is encompassed within that responsibility. [255]

Nonetheless, Appellant asserts this assignment of error.

A. Trial Defense Counsel were ineffective when they failed to maintain objections to the Military Judge's erroneous instructions on voting procedures after the panel voted to acquit.

Civilian Defense Counsel did not waive any error for the Military Judge's failure to properly instruct the members after they initially voted to acquit.[256] The Defense made an oral, then written, post-trial motion for appropriate relief asking the Court to set aside the findings of guilty based on acquittal.[257]

After receiving the note, the Military Judge proposed re-instructing the members on the standard voting procedures, to include a reminder to request reconsideration instructions if the members wished to reconsider. The Defense said they "would not object to that, Your Honor."[258] At first blush, this appears to be a waiver of error for this particular instruction. However, when read in context of the preceding pages of the transcript, the Defense's statement was predicated on a belief that the instruction was simply an administrative step to implement the findings the

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[255] *United States v. Vargas*, 74 M.J. 1, 8 (C.A.A.F. 2014) (citing *Taylor v. Kentucky,* 436 U.S. 478, 489 n. 17, 98 S.Ct. 1930, 56 L.Ed.2d 468 (1978) ("'The trial judge has the responsibility for safeguarding both the rights of the accused and the interests of the public in the administration of criminal justice'" (citations omitted)); Rule for Courts-Martial 801((a)(3), Manual for Courts-Martial (2024).
[256] App. Ex. 107 (Member Statement indicating they voted).
[257] App. Ex. 110 (Def. Post-Trial Motion for Appropriate Relief); R. at 152 (Art. 39(a) of 21 May 2023).
[258] R. at 141-153 (Art. 39(a) of 21 May 2023).

members already reached by vote – to acquit. Immediately after the members returned with a second vote to convict, without having received reconsideration instructions, the Defense immediately moved the Court to set aside those second findings.

This issue is preserved, but if the Court views the Defense's statement as a waiver of error for this instruction, such a waiver constituted ineffective assistance of counsel. Whether the members voted to acquit or convict and how they were instructed to do so is the very heart of any criminal case. As a direct result of this erroneous instruction, the members returned with the results of a second vote, this time to convict. A waiver at a time like this on an issue like this is would be an abdication of one's role as a defense attorney. But for this instruction, Appellant's initial acquittal may have remained in place. This is the definition of prejudice to Appellant.

B. Trial Defense Counsel were ineffective when they failed to clearly assert and maintain objections to the Military Judge allowing additional offenses to be considered as part of Specification 1.

i. Prejudice analysis under Marshall[259] for Issue IV (Fatal Variance) considers Trial Defense Counsel's strategy. The analysis for fatal variance goes hand-in-hand with that for the de facto major changes to Specification 1.

"[The CAAF] looks closely at the specifics of the defense's trial strategy when determining whether a material variance denied an accused the opportunity to defend against a charge. In so doing, we consider how the defense channeled its efforts and what defense counsel focused on or highlighted."[260]

If this Court takes the extraordinary view that the Defense waived essentially all of Appellant's due process rights including notice, proper charging, Article 32 and Article 34 procedures, proper referral, and arraignment for each of the four images ostensibly added to the

[259] *United States v. Marshall*, 67 M.J. 418, 419 (C.A.A.F. 2009), *aff'd,* (C.A.A.F. Jan. 15, 2010).
[260] *United States v. Treat*, 73 M.J. 331, 336 (C.A.A.F. 2014) (*citing*, *Marshall,* 67 M.J. at 421; *Teffeau,* 58 M.J. at 67; *United States v. Lovett,* 59 M.J. 230, 236 (C.A.A.F.2004)).

specification post-referral, and without the benefit of a colloquy from the Military Judge, then the only conclusion that can follow is that Appellant received ineffective assistance from his counsel.[261]

Even if the Court finds the Defense did waive some of Appellant's due process rights within accepted defense practice, neither he, the Trial Counsel, nor the Military Judge had the authority to refer the additional offenses of the four images to this court-martial, and the Convening Authority took no such action to refer them. Thus, the offenses that served as the basis for Appellant's conviction were never properly before the Court-Martial, and the Court lacked jurisdiction. See Issue III.

When discussing what images should be listed on the Findings Worksheet, the Military Judge referenced *U.S. v. Dow.*[262] While that case highlighted the need to itemize the images on the Findings Worksheet to ensure this Court had the ability to conduct a proper factual sufficiency review under Art. 66, *Dow* does not support adding new offenses to the Findings Worksheet post-arraignment and referral that were not part of an amended charge under R.C.M. 603, not the subject of an Art. 32 preliminary hearing, and not properly referred to the court-martial. *Dow* served as a valid reason to list each of the *eight* charged and noticed images on the Findings Worksheet only. Any valid Defense strategy ends there.

Dow was not a valid authority for amending a charge de facto post-referral via the Findings Worksheet. To the extent the Military Judge relied on this case for that purpose, it was error, and to the extent the Defense similarly relied on it, their assistance was ineffective in this regard. It is

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[261] *See, e.g.*, Rule for Courts-Martial 705(c)(1)(B), Manual for Courts-Martial (2019 ed.).
[262] *United States v. Dow*, No. ARMY 20200462, 2022 WL 2161607, at *1 (A. Ct. Crim. App. June 14, 2022); App. Ex. 47 (Military Judge's email discussing *Dow*); R. at 347 (Art. 39(a) of 16 May 2022) (discussing *Dow*); R. at 979 (Art. 39(a) of 18 May 2022) (Discussing *Dow* – incorrectly transcribed as "*Dile*").

immaterial if the Government noticed its *intent* to add these images to the specification,[263] because they ultimately never amended the Specification.

Civilian Defense Counsel's overly broad reading of *Dow* and flawed reliance on it to permit a *de facto* post-referral major change to Specification 1 resulted in the fatal variance Appellant now claims, and both of these issues resulted in Appellant's only convictions. The Defense's overly-broad reading of Dow undermines any Government argument that this perspective was part of some defense strategy under *Treat*[264] for purposes of variance analysis. If there was a defense strategy, it was fundamentally ineffective in this aspect of the case.

Civilian Defense Counsel noted that in any event, the Government could get a variance instruction.[265] However, this reasoning is flawed as well, because such an instruction would not have permitted the Government to "change the nature or identity of the offense,"[266] which is exactly what happened here.[267] In a sense, the Benchbook variance instruction permits the members to make minor changes to the specification. The standard variance instruction that Civilian Defense Counsel presumably referred to reads:

7–15. VARIANCE–FINDINGS BY EXCEPTIONS AND SUBSTITUTIONS

If you have doubt about the (time) (place) (manner in which the injuries described in the specification were inflicted) (_____), but you are satisfied beyond a reasonable doubt that the offense (or a lesser included offense) was committed (at a time) (at a place) (in a particular manner) (_____) that differs slightly from the exact (time) (place) (manner) (_____) in the specification, you may make minor modifications in reaching your findings by changing the (time) (place) (manner in which the alleged injuries described in the specification were inflicted) (_____) described in the specification, provided that you do not change the nature or identity of the offense (or the lesser included offense).

As to (The) Specification (___) of (The) (Additional) Charge (___), if you have doubt that _____, you may still reach a finding of guilty so long as all the elements of the offense (or a lesser included offense) are proved beyond a reasonable doubt, but you must modify the specification to correctly reflect your findings.

[268]

[263] App. Ex. XV, XVII (Gov. Responses to Def. Motion to Exclude MRE 404(b).
[264] *United States v. Treat*, 73 M.J. 331 (C.A.A.F. 2014).
[265] R. at 153 (Art. 39(a) of 20 December 2022).
[266] See the standard variance instruction from the Military Judges' Benchbook cited below.
[267] See analysis in Issue IV (Fatal variance).
[268] Military Judges' Benchbook, Instruction 7-15. Variance – Findings by Exceptions and Substitutions, https://www.jagcnet.army.mil/EBB/.

This instruction provides guidance on findings by exceptions and substitutions, but as noted, R.C.M. 603 does not permit major changes in most circumstances. Civilian Defense Counsel's belief that such an instruction would inevitably cure this material variance, this major change, was mistaken for purposes of *Treat* analysis, and ineffective. The Military Judge's instructions on findings incorporated some aspects of the standard variance instruction, but again, these instructions were deficient for the same reason that they did not and could not authorize a *de facto* major change to Specification 1, or cure the fatal variance that followed.[269]

Conclusion

Appellant received ineffective assistance of counsel at trial because his Counsel failed to ensure Appellant received due process throughout the proceedings, failed to maintain objections to the Military Judge's erroneous instructions on voting procedures after the panel voted to acquit, and failed to clearly assert and maintain objections to the Military Judge allowing additional offenses to be considered as part of Specification 1. These issues severely prejudiced Appellant. Defense counsel is the last back-stop for due process. The Military Judge surely erred, but Appellant should have been able to rely on his Counsel to effectively defend him on these highly technical and critical issues. Therefore, the convictions must be set aside with prejudice.

VII.

THE EVIDENCE IN SPECIFICATION 1 OF THE CHARGE WAS LEGALLY AND FACTUALLY INSUFFICIENT.

Standard of Review

[269] R. at 121 (Art. 39(a) of 21 May 2023); *see also*, App. Ex. 101 (Instructions on Findings Worksheet).

Whether the evidence in the record is legally sufficient to support a finding of guilty is reviewed *de novo*.[270]

Law and Analysis

The test for legal sufficiency is whether, considering the evidence in the light most favorable to the Government, any rational trier of fact could have found the elements of the crime beyond a reasonable doubt.[271] Courts "draw every reasonable inference from the evidence of record in favor of the prosecution."[272]

For factual sufficiency, courts "weigh the evidence in the record of trial, make allowances for not having observed and heard the witnesses, and then ask whether [it is] independently convinced of Appellant's guilt beyond a reasonable doubt."[273] Courts apply "neither a presumption of innocence or a presumption of guilt."[274]

A. The Elements of Article 134, UCMJ, Possessing Child Pornography.

To sustain Appellant's conviction for wrongfully possessing child pornography, the Government must have proven beyond a reasonable doubt that: (1) Appellant *knowingly and wrongfully possessed* child pornography, and (2) under the circumstances, the conduct of the accused was of a nature to bring discredit upon the armed forces.[275] Courts consider several factors regarding the wrongfulness element, particularly whether the images were (1) unintentionally or

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[270] *United States v. Smith*, 68 M.J. 316, 322 (C.A.A.F. 2010).
[271] *Jackson v. Virginia*, 443 U.S. 307, 318-319 (1979); *United States v. Turner*, 25M.J. 324, 325 (C.M.A. 1987); *United States v. Reed*, 51 M.J. 559, 561-62 (N-M. Ct. Crim. App. 1999), *aff'd.* 54 M.J. 37 (C.A.A.F. 2000); *see also* Art. 66, UCMJ.
[272] *United States v. Lyle*, No. 202100100, 2022 WL 4939343, at *2 (N-M. Ct. Crim. App. Oct. 4, 2022), *review denied*, 83 M.J. 306 (C.A.A.F. 2023) (citing *United States v. Gutierrez*, 74 M.J. 61, 65 (C.A.A.F. 2015)).
[273] *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987).
[274] *Lyle*, 2022 WL 4939343, at *2.
[275] MCM pt. IV, para. 68.b.(1).

(2) inadvertently acquired.[276] This includes "the method by which the visual depiction was acquired, the length of time the visual depiction was maintained, and whether the visual depiction was promptly, and in good faith, destroyed or reported to law enforcement."[277]

i. Court of Appeals for the Armed Forces Precedent.

In *United States v. Navrestad*, the Court set aside the accused's conviction for possessing child pornography, finding that the evidence of viewing and sending a link containing child pornography to another person was legally insufficient to establish dominion and control.[278] The Court held that knowing possession requires the viewing of the images to be both "knowing and conscious."[279] The accused did not knowingly possess images of child pornography where: (1) he could not access the areas of the computer's hard drive where the images were automatically saved; (2) he could not download the images to a portable storage device; and (3) there was no evidence he had emailed, printed, or purchased copies of the images.[280]

In *United States v. King*, the Court emphasized the importance of circumstantial evidence.[281] In that case, the accused was found guilty of knowingly and wrongfully viewing child pornography based on circumstantial evidence, including the accused's use of search terms[282] and admissions about viewing similar images.[283] The accused admitted to viewing images, being "thrilled" by them, and masturbating to them.[284] Unlike *Navrestad*, where dominion and control

[276] *MCM,* pt. IV, ¶ 68b.c.(9).
[277] *MCM,* pt. IV, ¶ 68b.c.(9).
[278] *United States v. Navrestad*, 66 M.J. 262, 268 (C.A.A.F. 2008).
[279] *Id.* at 267.
[280] *Id.* at 267.
[281] *United States v. King*, 78 M.J. 218 (C.A.A.F. 2019).
[282] *Id*. at 221 ("Skimpy preteen;" "sexy little girls;" and "Loli porn.").
[283] *Id*. at 219.
[284] *Id*.

over the images were critical, *King's* case focused on the accused's intent and actions leading to the images being cached on his computer.[285]

ii. Service Courts of Criminal Appeals Precedent.

Service courts have required corroborating evidence of knowledge in child pornography cases. In *United States v. Moss*, the court affirmed the conviction where evidence of child pornography was in cache, the accused used search terms associated with child pornography, and he had a partially downloaded video in his downloads folder.[286] In *United States v. Davenport*, the conviction was upheld although the child pornography was in cache because the accused admitted to downloading child pornography, ran search terms such as "pedo," and "Lolita," and shared images via Skype.[287] In *United States v. Lyle*, the conviction was affirmed where evidence of child pornography was in cache, the accused discussed child pornography over Snapchat, and sent images to another person.[288] The court noted that mere presence of images in cache may carry weight if other evidence of knowledge is present, such as search terms and communications.[289]

Service courts have found evidence sufficient to establish knowing possession when the Government presents additional evidence demonstrating knowledge, even if the evidence is

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[285] *Id*.
[286] *United States v. Moss*, No. ACM 40249, 2023 WL 2818699 (A.F. Ct. Crim. App. 2023).
[287] *United States v. Davenport*, 2016 CCA LEXIS 729 (A. Ct. Crim. App. 2016).
[288] *United States v. Lyle*, No. 202100100, 2022 WL 4939343 (N-M. Ct. Crim. App. 2022).
[289] *Id.* at 2; *see also United States v. Kamara*, No. NMCCA 201400156, 2015 WL 2438269, (N-M. Ct. Crim. App. May 21, 2015) (Where the court set aside a specification for possession of child pornography, finding no knowing possession where the images were in unallocated space, and there was no evidence the appellant had the tools or knowledge to access them.); *United States v. Schempp*, No. ARMY 20140313, 2016 WL 873852, at *1 (A. Ct. Crim. App. Feb. 26, 2016).
(Where the court found the evidence legally insufficient to support a conviction where the files were in unallocated space, and there was no evidence the accused had the tools or knowledge to access them.).

located in unallocated space or cache. However, to "knowingly" possess child pornography, the possession must be "knowing and conscious."[290]

B. Legal Insufficiency.

The evidence supporting Appellant's conviction for possessing child pornography is legally insufficient because the images or documents for which Appellant was convicted were found in unallocated space or in cache files, which are not readily accessible.

i. Cache files do not demonstrate knowing possession.

The mere presence of files in cache does not establish that the accused knowingly possessed child pornography. In this case, the Government's own expert, Mr. [redacted], admitted uncertainty regarding whether the images were actually viewed by Appellant. The expert could not definitively state if the images were part of an automatically cached webpage or if Appellant interacted with them in any manner that would indicate knowing possession.

Additionally, the images were located in areas of Appellant's phone and hard drive that are not typically accessible without specialized forensic software. In *United States v. Navrestad*, the Court set aside the conviction because the accused could not access the areas of the hard drive where the images were automatically saved. Similarly, in this case, there is no evidence that Appellant had the ability or knowledge to access these files, download them, or distribute them.

ii. Insufficient Corroborating Evidence.

There was no additional evidence presented that Appellant was the user when the images were allegedly accessed. The computer was located in a shared space, accessible by multiple individuals, and no specific evidence linked Appellant to the actual viewing or intentional

[290] MCM pt IV, para. 68.b.c.(5).

download of the images. The timeframe in question spans several months, further complicating the attribution of specific actions to Appellant.

iii. Absence of Intentional Actions.

Unlike in *King*, where the accused admitted to seeking out and being aroused by child pornography, there were no such admissions or actions in Appellant's case. The Government did not provide evidence that Appellant used specific search terms related to child pornography, shared the images, or took steps to preserve or conceal them. The presence of images in unallocated space alone does not indicate knowing and wrongful possession, especially without evidence of Appellant's intent or awareness.

A. Factual Insufficiency.

Weighing the evidence, the Government failed to establish beyond a reasonable doubt that Appellant knowingly and wrongfully possessed the images of child pornography. The images were found in cache and unallocated space, areas where files can be stored without the user's knowledge. The Government's expert could not definitively state that the images were ever displayed on Appellant's screen or that Appellant was even aware of their existence. Unlike cases where knowledge and wrongful intent could be inferred from other independent evidence, such as attempts to delete files or communications about child pornography, there is no such corroborating evidence in this case.

The Government's case relied solely on the presence of files in inaccessible parts of the computer, which is insufficient to establish knowing possession. Even if the images were accessible, the Government did not prove that Appellant's viewing of the images was knowing and wrongful. There is no evidence that Appellant intentionally sought out or even viewed the images, or that he had any predisposition to view child pornography.

Furthermore, the Government's medical expert admitted that, based on Image 720d alone, he is not comfortable identifying the individual in that image as a minor.[291]

Conclusion

The Government did not meet its burden of proof beyond a reasonable doubt. The evidence is legally and factually insufficient to sustain Appellant's conviction for possessing child pornography under Specification 1 of the sole Charge. The images were stored in inaccessible locations and there was no additional evidence of knowing possession. Therefore, the findings should be reversed and the charge dismissed.

CONCLUSION

Appellant faced offenses at trial which he was never charged with committing. Upon deliberation, he was initially acquitted of The Charge and both Specifications. Then, after additional judicial error, the panel voted again and convicted Appellant of wrongfully possessing two images of child pornography which were never part of the charged misconduct. Simultaneously, Appellant was acquitted of all charged offenses, and of possessing two additional uncharged images.

Appellant was denied due process as a result of the Military Judges' instructional errors and because he permitted a *de facto* amendment to the Charge and Specification 1 post-referral without complying with R.C.M. 603. The Court-Martial lacked jurisdiction because the offenses were never referred. Appellant's Counsel was also ineffective to the extent they did not make or maintain appropriate objections to these issues. Lastly, the evidence was factually and legally

[291] R. at 78 (Art. 39(a) of 19 May 2023) (Cross Examination of Dr. [redacted]; *see also*, R. at 923 (Art. 39(a) of 18 May 2023) (Where on cross examination, Special Agent [redacted] described the woman in "Image 720d" as "possibly minor" in terms of her age); App. Ex. 110 at 14 (Def. Post-Trial Motion for Appropriate Relief).

insufficient because the images were in cache. For these reasons, this Court must set aside Appellant's conviction in Specification 1 with prejudice.

DATE: 03 JULY 2024

Respectfully submitted,

POPE.THADEUS.JAC[redacted]
KSON[redacted]
Digitally signed by POPE.THADEUS.JACKSON[redacted]
Date: 2024.07.03 00:34:36 -04'00'

Thad Pope
LCDR, USCG
Appellate Defense Counsel
[redacted]

Certificate of Filing and Service

I certify that the foregoing was filed electronically with this Court and that a copy was delivered to opposing counsel via email on 3 July 2024.

POPE.THADEUS.JAC[redacted]
KSON[redacted]
Digitally signed by POPE.THADEUS.JACKSON[redacted]
Date: 2024.07.03 00:35:06 -04'00'

Thad Pope
LCDR, USCG
Appellate Defense Counsel
[redacted]

IN THE UNITED STATES COAST GUARD
COURT OF CRIMINAL APPEALS

UNITED STATES,
Appellee

v.

Erick R. KELLEY
Electronics Technician
Second Class (E-5)
U.S. Coast Guard,
Appellant

12 July 2024

APPELLANT'S MOTION FOR EXAMINATION OF SEALED MATERIALS, FILED 20 JUNE 2024

CGCMG 0396

DOCKET NO. 1495

ORDER

On consideration of Appellant's Motion for Examination of Sealed Material, it is, by the Court, this 12th day of July, 2024,

ORDERED:

That Appellant's Motion is hereby denied as moot, in that it duplicates a previous motion that was granted.

For the Court,
VALDES.SARAH.P.[redacted]
Digitally signed by [redacted]
Date: 2024.07.12 11:40:11 -04'00'
Sarah P. Valdes
Clerk of the Court

Copy: Judge Advocate General's Representative
Appellate Government Counsel
Appellate Defense Counsel

IN THE UNITED STATES
COAST GUARD COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee* v. **Erick R. KELLEY**, Electronics Technician Second Class/E-5 U.S. Coast Guard, *Appellant*	23 JULY 2024 APPELLANT'S ASSIGNMENTS OF ERROR (CORRECTED) Docket No. 1495 Case No. CGCMG 0396 Before McClelland, Havranek, Brubaker Tried at Alameda, CA on 15-21 May 2023 before a General Court-Martial convened by Commander, U.S. Coast Guard Pacific Area

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TO THE HONORABLE JUDGES OF THE UNITED STATES
COAST GUARD COURT OF CRIMINAL APPEALS

Thad J. Pope
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Appellate Defense Counsel
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VII.

WHETHER THE EVIDENCE IN SPECIFICATION 1 OF THE CHARGE WAS LEGALLY AND FACTUALLY SUFFICIENT.

Statement of Statutory Jurisdiction

This case is within this Court's jurisdiction under Article 66(b)(3), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866, because Appellant received an approved court-martial sentence that includes a dishonorable discharge.

Statement of the Case

On 21 May 2023, consistent with his pleas, Appellant was acquitted of one specification of wrongfully distributing child pornography videos.[1] Contrary to his pleas, and in conflict with the panel's initial decision, a general-court martial convicted Appellant of one specification of knowingly and wrongfully possessing child pornography in violation of Article 134, UCMJ.[2] The Military Judge sentenced him to twelve months' confinement, reduction to E-1, and a dishonorable discharge (DD).[3]

[1] Statement of Trial Results at 2.
[2] Statement of Trial Results at 2; 10 U.S.C. § 920c.
[3] Statement of Trial Results at 1.

Introduction

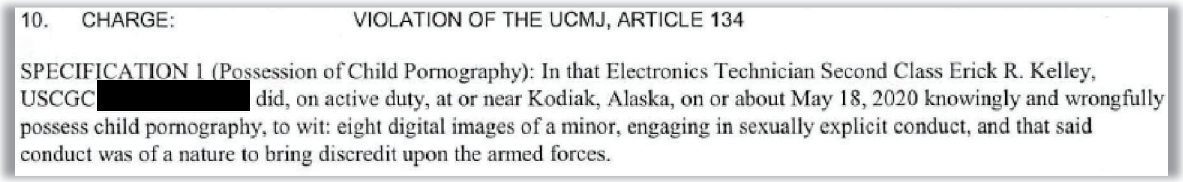
Appellant faced offenses at trial which he was never charged with committing. Upon deliberation, he was initially acquitted of The Charge and both Specifications. Then, after additional judicial error, the panel voted again and convicted Appellant of wrongfully possessing two images of child pornography which were never part of the charged misconduct. Simultaneously, Appellant was acquitted of all charged offenses, and of possessing two additional uncharged images.

Statement of the Facts

Facts Relevant to Issues II-IV, VI (Due Process, Added offenses to Spec. 1, Variance, related IAC)

A. The Government charged Appellant with possessing eight images under Specification 1, not eleven as shown on the Findings Worksheet. The Charge was never withdrawn, amended, re-preferred, or referred anew.

In Specification 1 of the Charge, Appellant was charged with knowingly and wrongfully possessing eight images of child pornography: [4]



10. CHARGE: VIOLATION OF THE UCMJ, ARTICLE 134

SPECIFICATION 1 (Possession of Child Pornography): In that Electronics Technician Second Class Erick R. Kelley, USCGC [redacted] did, on active duty, at or near Kodiak, Alaska, on or about May 18, 2020 knowingly and wrongfully possess child pornography, to wit: eight digital images of a minor, engaging in sexually explicit conduct, and that said conduct was of a nature to bring discredit upon the armed forces.

The charge sheet did not specify or describe these eight images, and no Bill of Particulars was ever issued. However, these eight images were specifically identified during the Article 32, UCMJ, preliminary hearing held on 17 May 2022.[5] During the preliminary hearing, the Government clarified, "for purposes of this ROI, the images at issue will be the images found on pages three of

[4] Charge Sheet.
[5] Art. 32 Report at 1.

four of the [Child Identification Report provided by NCMEC]" (excerpted below), and that "*these are the eight images that are subject to Specification 1 of this charge*."[6]

Child Identification Report

The following does not constitute verification of the identity of the child. It is the responsibility of the investigator/ prosecutor to contact the listed law enforcement agency for verification of image and age verification of the child.

NCMEC Request #:	148463
Series:	Goddess on Green1
Agency:	Child Protection Division of the Center for combating cyber-crimes
Investigator:	[redacted]
State:	
Country:	
Email:	
Preferred Method of Contact:	
Case #:	2011515240; 2011515242
# of Files:	8
Files Found:	CS2007001061-CRIS/Images/Images1/102CCACD8F1A01C98AB717ED3E33E838.jpg CS2007001061-CRIS/Images/Images1/15A7870EB458CDD839DBF050465840B8.jpg CS2007001061-CRIS/Images/Images1/1860A22A161E9134BA12871A6D3012E9.jpg CS2007001061-CRIS/Images/Images1/4892E190BFBC299EDE0468429B2454D8.jpg CS2007001061-CRIS/Images/Images1/7600C47B3D78F111736262EBF3ABED39.jpg CS2007001061-CRIS/Images/Images1/D11315B93F62ABC89694D46D91C8259E.jpg CS2007001061-CRIS/Images/Images1/F50F749518CE5378AB36E53F165399EC.jpg CS2007001061-CRIS/Images/Images1/FDD3C1B045418DD69A2C10530FD7E738.jpg

[7]

The Preliminary Hearing Officer (PHO) considered evidence that CGIS' Electronic Crimes Section and DHS' Cyber Crimes Center analyzed in conjunction with the National Center for Missing and Exploited Children (NCMEC).[8] This examination "yielded positive matches for nine images identified with known child victims."[9] The PHO noted that some of the data included duplicates and the possibility of other potential defenses.[10] Nonetheless, the PHO found probable cause for Specification 1, and noted that "Government Exhibit 13 of enclosure (2) includes the

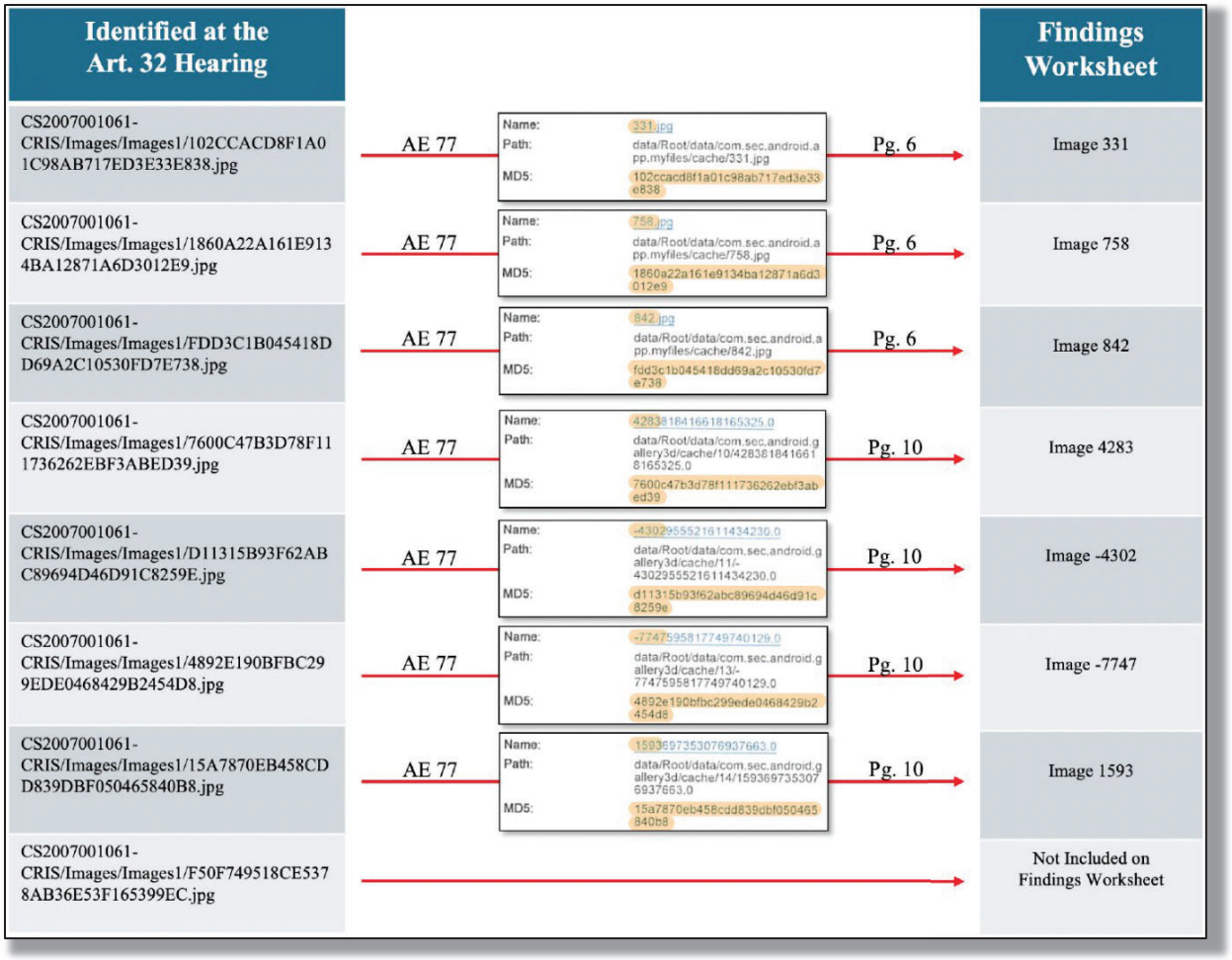
[6] Audio Recording of Art. 32 Preliminary Hearing at timestamp 26:14-26:35 (emphasis added).
[7] Art. 32 Report, Ex. 13 of encl. (2) at 5 (Bates No. 000021).
[8] Art. 32 Report at 2.
[9] Art. 32 Report at 3.
[10] Art. 32 Report at 2.

Child Identification Report provided by NCMEC. This report yielded *eight* files *associated with entitled series "Goddess of the Green 1*."[11]

Government Exhibit 13 of Enclosure (2) to the Article 32 Report reveals the file names of these eight images.[12] Only seven of the original eight noticed images were included on the Findings Worksheet,[13] and four uncharged images were added.[14] This resulted in eleven named images on the Findings Worksheet. The Court can determine which of the original eight images noticed at the Article 32 were ultimately listed on the Findings Worksheet[15] by cross-referencing those documents with App. Ex. 77,[16] and Pros. Ex. 29.[17]

Undersigned counsel compiled a diagram below, linking the naming conventions used in the Findings Worksheet with those that the Government used during the Article 32 preliminary hearing and in the Preliminary Hearing Officer's report.[18] The page numbers on the right-hand side of the diagram reference pages of App. Ex. 77.

[11] Art. 32 Report at 4 (emphasis added).
[12] Art. 32 Report, Ex. 13 of encl. (2) at 5.
[13] These included: Image 331, Image 758, Image 842, Image 4283, Image 4302, Image 7747, and Image 1593. These images constituted items 4, 5, 6, 8, 9, 10, and 11 on the Findings Worksheet (App. Ex. 105 at 3). The Record is unclear as to why eight were charged, but only seven of those were listed on the Findings Worksheet.
[14] These included: Hebes.pdf (convicted), Image 720d (convicted), Image 85d5, and Image 296. These images constituted items 1, 2, 3, and 7 on the Findings Worksheet (App. Ex. 105 at 3).
[15] App. Ex. 105 at 3 (Findings Worksheet).
[16] App. Ex. 77 (Redacted version of Pros. Ex. 18, 19, 20 – see file names listed in File Info).
[17] Pros. Ex. 29 (Image Index); *see also*, R. at 19 (Art. 39(a) session of 15 May 2023 (wherein the Military Judge describes that the Government's Image Index in Pros. Ex. 29 reflects the file names that appear on the compact discs provided in the sealed Prosecution Exhibits).
[18] Art. 32 Report, Ex. 13 of encl. (2) at 5.



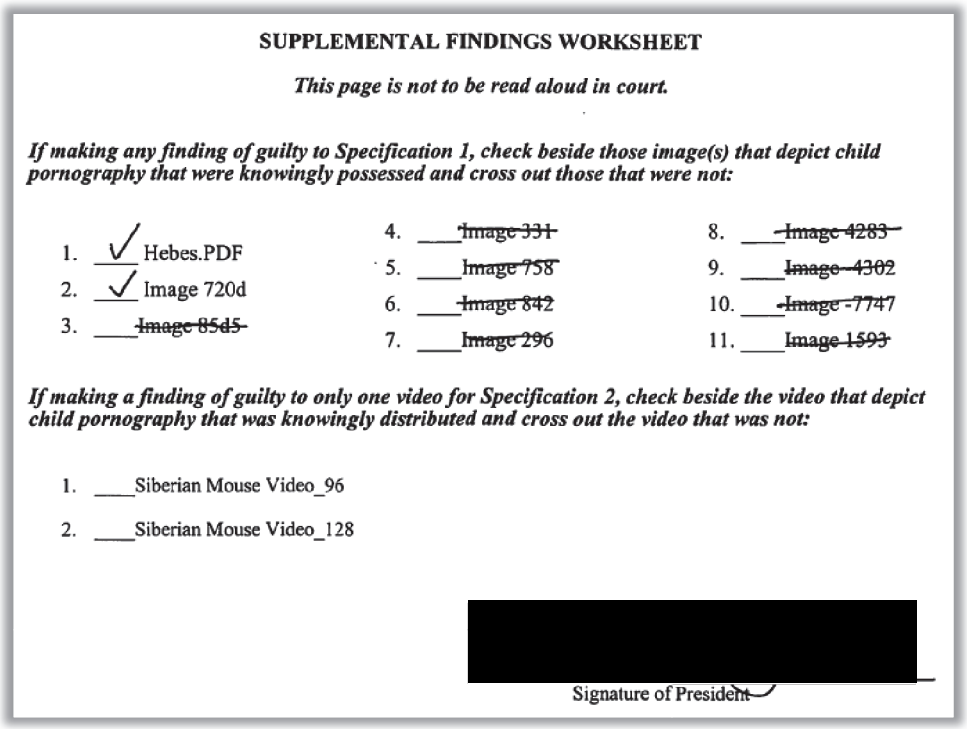
The Hebes PDF file, one of the four uncharged images, contained as many as eight additional images of child pornography within a collage of images.[19] Eight uncharged images from the Hebes PDF collage (generally referred to as one image or PDF throughout this brief since it was identified as one image on the Findings Worksheet), plus the three other uncharged images on the Findings Worksheet equals eleven uncharged images that went to the members for findings. The other seven charged images were also on the worksheet, making a total of eighteen images that the members considered for Specification 1.

[19] The Hebes.pdf includes a collage of nine different images, eight of which could depict child pornography. One of those nine images depicts a child who is fully clothed and not engaging in sexual conduct. The members did not make specific findings with respect to the Hebes.pdf file as to which image or images in the collage constituted child pornography.

The Charge Sheet was never amended to account for the addition of four images which were ultimately added to the Findings Worksheet. The Article 34, UCMJ, advice did not discuss which images or files were charged but referenced the Article 32 Report, which again cited the eight images that the Government initially identified.[20] The Convening Authority referred the original, unamended Charge and two specifications,[21] and the Appellant was arraigned on this same Charge and Specifications.[22] Because the Charge Sheet was never amended, the additional offenses were never referred.

The two images for which Appellant was convicted of possessing[23] were not listed on the Child Identification Report (CIR), not among the original eight identified by the PHO, and not noticed by the Government as constituting the possession offense under Specification 1.[24] To the contrary, although never added to the Charge Sheet, they were added to the court-martial offenses when Government Counsel was permitted by the Military Judge to merely add them to the Findings Worksheet. While Appellant was acquitted of all charged offenses, as well as two additional non-charged offenses ("Image 85d5" and "Image 296"), he was eventually convicted of possessing the "Hebes.PDF" and "Image 720d," offenses that were added via the Findings Worksheet.[25]

[20] Staff Judge Advocate's Pre-Trial Advice Under Article 34, UCMJ.
[21] Charge Sheet at 2.
[22] R. at 3 (Art. 39(a) of 21 July 2022).
[23] Convening Authority's Action; EOJ at 3; Appellate Ex. 105 at 3 (Findings Worksheet).
[24] Art. 32 Report, Ex. 13 of encl. (2) at 5; Audio Recording of Art. 32 Preliminary Hearing at timestamp 26:14-26:35.
[25] Convening Authority's Action; EOJ at 3; Appellate Ex. 105 at 3 (Findings Worksheet). The findings worksheet listed eleven images.



SUPPLEMENTAL FINDINGS WORKSHEET

This page is not to be read aloud in court.

If making any finding of guilty to Specification 1, check beside those image(s) that depict child pornography that were knowingly possessed and cross out those that were not:

1. ✓ Hebes.PDF
2. ✓ Image 720d
3. ~~Image 85d5~~
4. ~~Image 331~~
5. ~~Image 758~~
6. ~~Image 842~~
7. ~~Image 296~~
8. ~~Image 4283~~
9. ~~Image 4302~~
10. ~~Image 7747~~
11. ~~Image 1593~~

If making a finding of guilty to only one video for Specification 2, check beside the video that depict child pornography that was knowingly distributed and cross out the video that was not:

1. Siberian Mouse Video_96
2. Siberian Mouse Video_128

[redacted]

Signature of President

[26]

Although the admissibility of the additional images was litigated from an evidentiary standpoint, confusion persisted during and after trial as to whether the images were admitted (1) as MRE 404(b) evidence; (2) as evidence of the charged crime (*res gestae* of the original eight noticed images); or (3) improperly as evidence of new, uncharged and unreferred offenses (possession of the images added to the Findings Worksheet).

When the Government filed notice on 8 August 2022 regarding M.R.E. 404(b) evidence it intended to use at trial, it not only put the defense on notice regarding potential MRE 404(b) evidence, it further established what images had been charged and what images had not been charged.[27] Specifically, by identifying a ".pdf file" as an image it proposed to use under MRE 404(b), the Government implicitly stated that this file was not included as one of the charged

[26] App. Ex. 105 at 3 (Findings Worksheet).
[27] App. Ex. XIV (Def. Motion to Exclude MRE 404(b)) (the Government erroneously dated this memo 2021 instead of 2022).

images/offenses.[28] Because it was *uncharged* misconduct, the Government gave notice that it wanted to use this image in support of proving Appellant was guilty of possessing one of the eight *charged* images.

Trial Defense Counsel objected to the Government's initial M.R.E. 404(b) notice in their Motion to Exclude evidence under M.R.E. 404(b) of 28 September 2022.[29] In their motion, the Defense argued that the Government failed to articulate a proper non-propensity use for this evidence, and that they simply listed all M.R.E. 404(b) exceptions. The Government provided an updated notice on 11 October 2022 with its intended uses of the evidence under M.R.E. 404(b).[30] The Defense provided a supplement to its motion to exclude MRE 404(b), providing an affidavit from Appellant, and arguing that the Government's notice fails the *Reynolds* prong requiring an M.R.E. 403 balancing test.[31]

On 13 December 2022, the Government provided an updated MRE 404(b) notice[32] to the Defense of the additional images, including "Hebes.pdf,"[33] and Image "720d."[34] On the one hand, the Government noted that the Court can offset potential prejudice under *Reynolds'* M.R.E. 403 balancing using limiting instructions "*to ensure that the 'other acts' evidence is not improperly*

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[28] Although the Government does not include a specific name for this file until its 13 Dec 22 response, labeling it "Hebes", it is clear that the reference to this pdf file in the initial notice and second, 11 Oct 22 notice, is to the same file.
[29] App. Ex. XIV (Def. Motion to Exclude MRE 404(b)).
[30] App. Ex. XV (Gov. Resp. to Def. Updated 404(b) Notice).
[31] *United States v. Reynolds,* 29 M.J. 105 (C.M.A. 1989); App. Ex. XVI (Def. Supp. Mot. To Exclude MRE 404(b) with Accused's Affidavit).
[32] App. Ex. XVII at 6-9 (Gov. Resp. to Def. Motion to Exclude MRE 404(b) (see also, Enclosures 4, 11 – Sealed).
[33] App. Ex. 111 at 6 (Gov. Resp. to Def. Post-Trial Motion for Appropriate Relief, 14 July 2023) (found in the cache of the Hanscom Office Suite application on the Android cell phone).
[34] App. Ex. 111 at 6 (Gov. Resp. to Def. Post-Trial Motion for Appropriate Relief, 14 July 2023) (found in the internet browser cache on the Android cell phone).

used by the fact-finder."[35] On the other hand, it is in this December 2022 response where the Government provides the first glimpse of its new theory that it can use "Image 720d" and the Hebes PDF and other images for purposes beyond MRE 404(b):

> Images of Child Erotica and other Child Sexual Abuse Material found on the Accused's Phone.4 See Enclosure 11. Over forty images/files found in the cache of the Accused's personal cell phone that contain pre-pubescent children in various scenes, these images include child sexual abuse material, images within the same file series as the charged CSAM, and images used to prove the charged offenses. The images show children in various unnatural, suggestive positions, and that would be identified as child erotica. Many of these images were also identified through Homeland Security Investigations (HSI) database as associated with verified series of child pornography. Due to all the images being found in the same location within the Accused's phone, the significant number of images that have the same young girl in the videos related to one of the charged offenses, and the number of images makes this evidence so closely intertwined with the charged offenses as to be "part and parcel" of both offenses. Therefore, the Government believes this evidence is *res gestae*. In addition, as stated in *Metz*, this evidence will assist the factfinder by providing context to the evidence and alleviate any confusion.

[36]

The Government's explanation for Hebes PDF hints at even more uses for this evidence:[37]

> The Hebes.pdf, in addition to the list of search terms and file names, contains 9 images of child erotica and child sexual abuse at the top of the document, this evidence is res gestae. This evidence is intrinsic and directly helps prove Charge l. The Accused is charged with possession of 'eight digital images of a minor, engaging in sexually explicit conduct.' **It is the Government's theory that many of those images on the top of the Hebes.pdf meet the legal definition of child pornography and are considered part of the charged offense, and therefore is res gestae.**[38]

While neither clear from this entry nor the motions session discussed below, this is the first clue that contrary to Constitutional protections, Rules for Courts-Martial, MREs, case law and established practice, the Government believed it had discovered a new way to add uncharged

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[35] App. Ex. XVII (Gov. Resp. to Def. Supp. to Mot. to Exclude MRE 404(b)) (emphasis added).
[36] App. Ex. XVII at 9 (Gov. Resp. to Def. Motion to Exclude MRE 404(b) (see Enclosure 11 – Sealed).
[37] App. Ex. XVII at 6 (Gov. Resp. to Def. Motion to Exclude MRE 404(b) (see Enclosure 4 – Sealed).
[38] App. Ex. XVII at 6 (emphasis added) (Gov. Resp. to Def. Supp. to Mot. to Exclude MRE 404(b)); *see also*, AE-XVII at 9-11, where the Government argues the Phone applications (Tor, FrostWire) are also *res gestae*, or alternatively admissible under M.R.E. 404(b).

misconduct as an additional offense to referred charges and could do so without even having to amend a Charge Sheet—by calling it "*res gestae*."[39]

At trial, the Government essentially proposed that because Hebes PDF meets the "legal definition of child pornography," in the Trial Counsel's opinion, and because the Appellant has been charged with possession of child pornography, the Trial Counsel can, *sua sponte*, add this to the case as a charged offense. There is no discussion on the record about how the Trial Counsel can add additional offenses without amending the charge sheet, let alone whether this would be a minor or major change under Rule for Courts-Martial 603. There is no discussion about how the Trial Counsel can add alleged misconduct without preferring additional offenses, serving as accuser, conducting an Article 32 hearing, providing Article 34 advice, referring, and then arraigning Appellant on additional offenses. The Defense did not intentionally relinquish or abandon any of these due process rights, nor was there a colloquy between the Military Judge and Appellant discussing such a waiver.

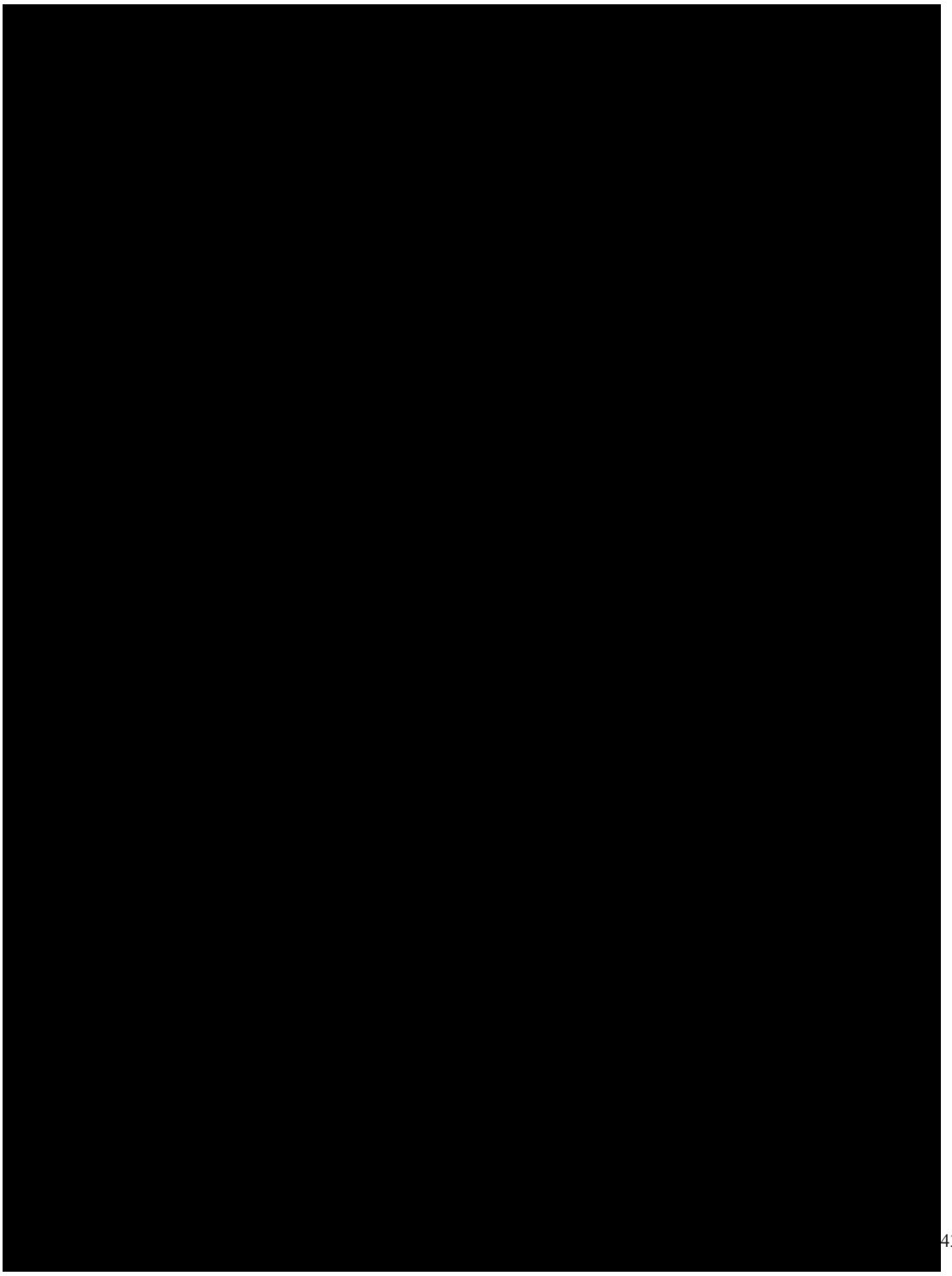
To the contrary, when the Military Judge held an Article 39(a) motions session on 20 December 2022 to litigate Trial Defense Counsel's Motion to Exclude this noticed M.R.E. 404(b) evidence, none of these fundamental issues were fully identified or discussed. Throughout that hearing, Civilian Defense Counsel discussed the "*eight images* [from the "Goddess of the Green series"[40]] that [Special Agent [redacted] discussed at the Article 32 *that <u>are</u> the charged images, in this case*."[41] Civilian Defense Counsel distinguished the M.R.E. 404(b) evidence as "one of those

[39] *United States v. St. Jean*, 83 M.J. 109, 112 (C.A.A.F. 2023) (defining *res gestae* "as '[t]he events at issue, or other events contemporaneous with them," and citing *Black's Law Dictionary* 1565 (11th ed. 2019)).
[40] R. at 49 (Art. 39(a) of 20 Dec 2022 with oral argument on the Defense's motion to exclude M.R.E. 404(b) evidence).
[41] R. at 43-49 (Art. 39(a) of 20 Dec 2022 with oral argument on the Defense's motion to exclude M.R.E. 404(b) evidence) (emphasis added).

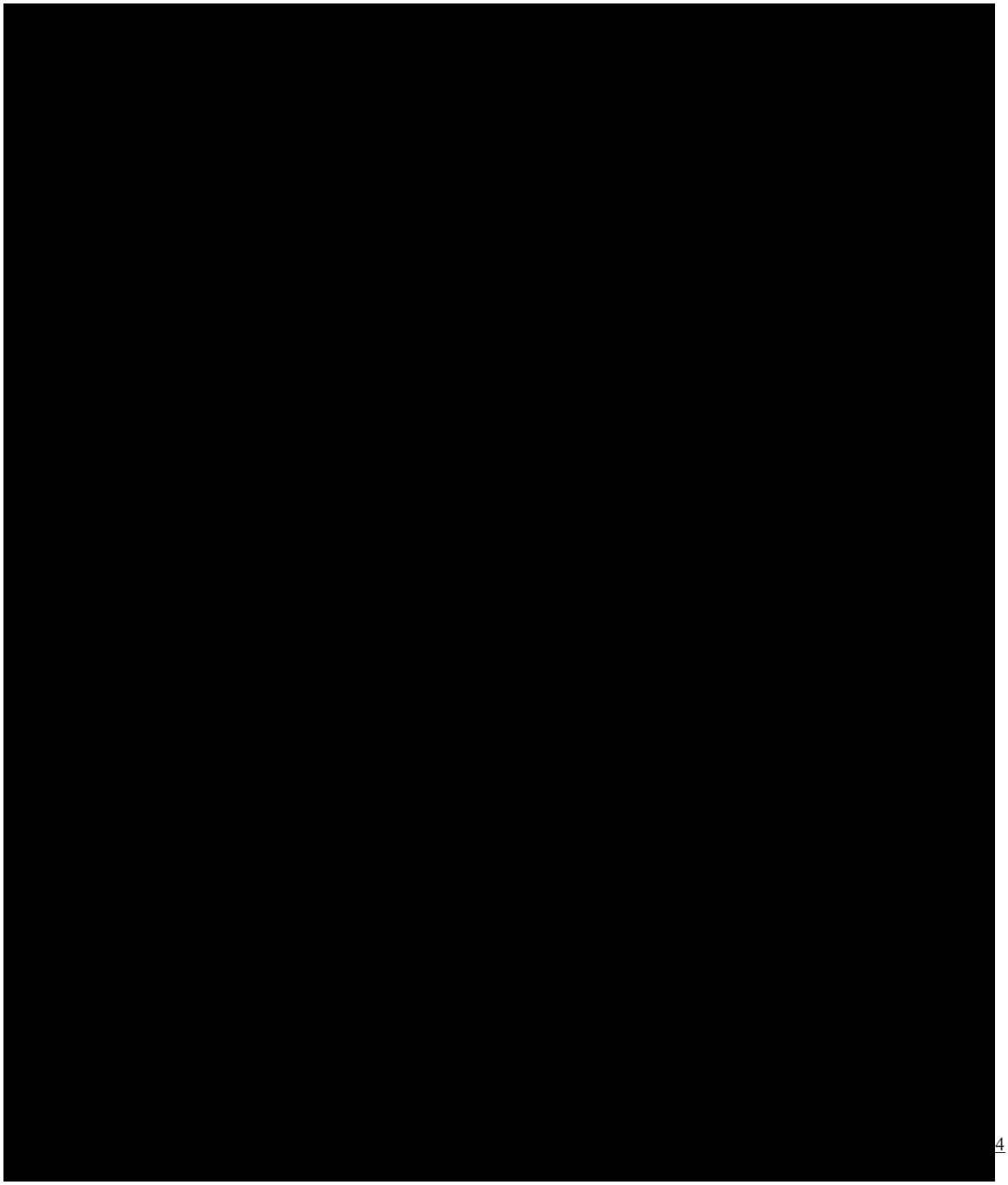
things that's *not the charged image*" when referring to the Hebes PDF file.[42] Civilian Defense Counsel articulated his objections to the Government's potential additional use of the M.R.E 404(b) evidence when he said:

[Continued below]

[42] R. at 44, 61 (Art. 39(a) of 20 Dec 2022) (emphasis added).

 [43]

[43] R. at 105 (Art. 39(a) of 20 Dec 2022).

 [44]

Shortly thereafter, the Government articulated its argument as to why the PDF and other evidence should be admissible as *res gestae* or M.R.E 404(b).[45] Specifically, the Government argued its burden is to prove Appellant was in possession of eight images of child sexual abuse material

[44] R. at 106 (Art. 39(a) of 20 Dec 2022).
[45] R. at 114-130 (Art. 39(a) of 20 Dec 2022).

("CSAM"). The Government said nine other CSAM images from the PDF depicting CSAM "can be included in this case."[46]

The Military Judge responded, "[s]o, beginning with the *res gestae* argument, so you're not even saying this is an example towards *res gestae*, being intrinsic with the charged offense. You're saying this is material of the charged offense."[47] Trial Counsel responded, "We are saying that the Government can include it, yes, it is proving the charged offense."[48] A moment later, the Military Judge again tried to clarify, saying:

> I think *res gestae* is just--is—it's still ultimately not information on which I think the government is basing its prosecution for the—for which the factfinder should decide whether or not it proves the case. *Res gestae* is just other information that's intrinsic, it's intertwined. So, to be clear, you're not saying--in your pleadings, you call it *res gestae*. You're saying those images are--are-- they for the factfinder to determine if that constitutes evidence and support of either of the two charges. Is that accurate?[49]

The Trial Counsel said, "Yes, Your Honor."[50] Again, without addressing how the Trial Counsel's proposal could overcome preferral, Article 32, Article 34, referral or basic due process issues, let alone whether Defense Counsel or Appellant personally could or would waive any of these issues, it appears the Military Judge begins to realize what *res gestae* means. He realizes that is does not support the Trial Counsel's proposal, and gets the Trial Counsel to go with a MRE 404(b) usage for the uncharged misconduct. The Military Judge then said, "Moving to, I guess, the 404(b), if the court doesn't find it's *res gestae* or permissible as evidence in support of the Government's

[46] R. at 114-119 (Art. 39(a) of 20 Dec 2022).
[47] R. at 116 (Art. 39(a) of 20 Dec 2022).
[48] R. at 116 (Art. 39(a) of 20 Dec 2022).
[49] R. at 116 (Art. 39(a) of 20 Dec 2022).
[50] R. at 117 (Art. 39(a) of 20 Dec 2022).

case, for 404(b), can you quickly give me your argument on [M.R.E 404(b)]?"[51] At this point, the Military Judge has demonstrated his understanding of *res gestae* and its limits.[52]

Civilian Defense Counsel then objected to the Government's "pivoting use of" the Hebes PDF.[53] In analyzing the MRE 403 balancing prong of *Reynolds*[54] and discussing the risk of confusing the members, Civilian Defense Counsel said, "*but I guess that's an area where even the defense is confused at this point, as to how this evidence is going to appear at trial*."[55]

Facts Relevant to Issue I, VI, VII (Acquittal, Improper Voting Instructions, related IAC)

B. The Panel informed the Military Judge that they "voted on both specs. but we don't have 3/4 majority on any individual files."[56]

The Government charged Appellant with "knowingly and wrongfully possess[ing] child pornography, to wit: eight digital images of a minor, engaging in sexually explicit conduct, and that said conduct was of a nature to bring discredit upon the armed services."[57]

After each party presented its evidence and closing argument, the military judge instructed the panel to:

> vote on specifications first then charge . . . . Concurrence of at least three-fourths of the members present, when the vote is taken, is required for any finding of guilt. Since we have seven members, that means that six members must concur in any finding of guilty. If you have at least six votes of guilty of any offense, then that will result in a finding of guilty for that offense. If fewer than six members vote for a finding of guilty, then your ballot resulted in a finding of not guilty. You may reconsider any finding prior to its being announced in open court. However, after you vote, if any member expresses a desire to reconsider any finding, open the court, and the president should announce only that reconsideration of a finding has

[51] R. at 117 (Art. 39(a) of 20 Dec 2022).
[52] The Court should review the Military Judge's failure to properly instruct the members and limit the Government's use of these images (or otherwise require an amendment to the Charges in compliance with R.C.M. 603) against this backdrop.
[53] R. at 120 (Art. 39(a) of 20 Dec 2022).
[54] *United States v. Reynolds,* 29 M.J. 105 (C.M.A. 1989).
[55] R. at 127-128 (Art. 39(a) of 20 Dec 2022).
[56] App. Ex. 107.
[57] Charge Sheet at 1.

> been proposed. In this circumstance, do not state whether the finding proposed to be reconsidered is a finding of guilty or not guilty or which specification is involved. I will then give you specific instructions on the procedure for reconsideration. As soon as the court has reached its findings and I have examined the Findings Worksheet, the findings will be announced by Commander [H.] in the presence of all parties.[58]

The Military Judge then provided the panel with a findings worksheet outlining two verdict options for Specification 1: (1) not guilty, or (2) guilty of one or both specifications. Within the second option, if picked, the panel was required to select one of the three choices: (a) not guilty, (b) guilty of possessing eight *or more* images, or (3) guilty of possessing fewer than eight images.[59] If the panel were to reach a guilty verdict, the Military Judge instructed the panel to identify the images they deemed to depict child pornography that the Appellant had knowingly and wrongfully possessed.[60]

The panel was tasked with evaluating each image individually, marking those for which they found the accused guilty and crossing out those for which they found the accused not guilty.[61] The military judge confirmed with the panel president whether he understood and was following the instructions. The panel president confirmed he understood the instructions and did not have any questions.[62]

The Military Judge then explained that if there were questions during deliberations, he would open the court and assist the members. After providing the instructions, a panel member asked the military judge to restate where "you mentioned we, the members, just determine which

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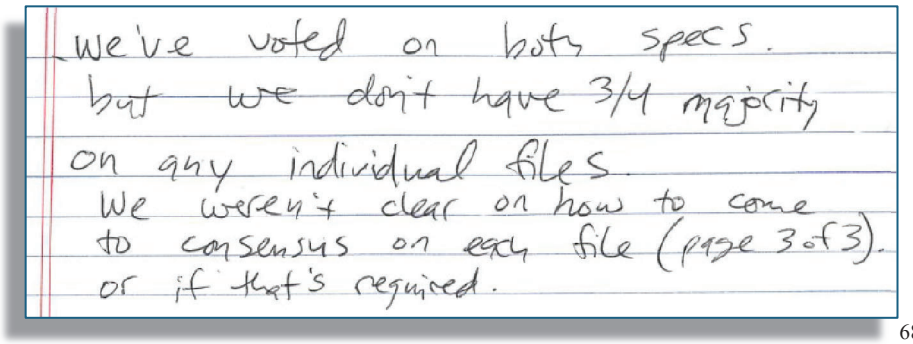
[58] R. at 117-19 (Art. 39(a) of 21 May 2022).
[59] Appellate Ex. 105 at 1. On the Findings Worksheet, the members lined through both options (acquittal and findings of guilt) and lined through "(if finding guilty of possessing less than EIGHT images)". This, along with the members' two differing votes, also raises the question of an ambiguous verdict.
[60] R. at 117-19 (Art. 39(a) of 21 May 2022).
[61] R. at 121 (Art. 39(a) of 21 May 2022).
[62] R. at 123 (Art. 39(a) of 21 May 2022).

charge to vote on and specifically the aspects of do—if we vote on the elements of The Charge."[63] The Military Judge interpreted this question to mean: "a panel member asked for the Military Judge to restate instructions on voting and whether they vote on the elements of the charge."[64] The military judge restated that the members would vote on specifications first and then on the charge. The member indicated the Military Judge's answer was sufficient.[65] After confirming the panel understood these instructions, he adjourned the court-martial for deliberations.[66]

After about five hours of deliberations, the panel submitted a handwritten note to the bailiff.[67] During an Article 39(a), UCMJ, session with the Appellant present, the Military Judge read the note aloud.


We've voted on both specs.
but we don't have 3/4 majority
on any individual files.
We weren't clear on how to come
to consensus on each file (page 3 of 3).
or if that's required.

[68]

Trial Defense Counsel then argued that the note demonstrated that a majority of the panel could not reach a guilty finding on "any individual files," therefore, announcement of the members' vote constituted a not guilty finding for Specification 1.[69] In contrast, the Government initially interpreted the note as showing the members reached a general verdict of guilty for the possession

[63] R. at 124-125 (Art. 39(a) of 21 May 2022).
[64] App. Ex. 119 at 2.
[65] R. at 124-125 (Art. 39(a) of 21 May 2022).
[66] R. at 131 (Art. 39(a) of 21 May 2022).
[67] R. at 134 (Art. 39(a) of 21 May 2022).
[68] App. Ex. 107.
[69] R. at 134-136 (Art. 39(a) of 21 May 2022).

specification.[70] The Military Judge placed the court in recess and conducted an R.C.M. 802 session, asking the parties to clarify their positions.[71]

After the recess, the Government changed their position and asked the Military Judge to re-instruct the panel, perceiving the members' note as a need for clarification.[72] Trial Defense Counsel asserted again that the panel's note revealed a verdict of not guilty, specifically highlighting that none of the images received a three-quarters (six-member) vote.[73] The Government then proposed providing an instruction to the members.[74] Without asking the members for clarification on their note, the Military Judge provided additional standard voting instructions to the members, but not a reconsideration instruction. See Issue V.

Facts Relevant to Issue VIII (Legal and Factual Sufficiency)

C. The evidence was legally and factually insufficient to prove Appellant could have knowingly possessed the images at issue because they existed in cache memory.

Images containing possible child pornography were found on Appellant's phone and hard drive during a forensic examination.[75] These files were located in unallocated space and cache files, making them not readily accessible without specialized forensic software.[76] Mr. [redacted] the Government's expert witness, conducted a detailed forensic analysis of the files. He later testified that the images were in locations that are not easily accessible to an average user and require specific forensic software to retrieve.[77]

[70] R. at 135 (Art. 39(a) of 21 May 2022).
[71] R. at 137 (Art. 39(a) of 21 May 2022).
[72] R. at 137 (Art. 39(a) of 21 May 2022).
[73] R. at 137-140 (Art. 39(a) of 21 May 2022).
[74] R. at 141 (Art. 39(a) of 21 May 2022).
[75] R. at 290 (Art. 39(a) of 15 May 2022).
[76] R. at 238 (Art. 39(a) of 15 May 2022).
[77] R. at 189, 251 (Art. 39(a) of 15 May 2022).

The Hebes PDF file was found on Appellant's personal cell phone.[78] This file contained a collage of at least eight images that could depict child pornography and a list of 35-37 file names and/or search terms associated with CSEM-related language.[79] Multiple downloaded files were also discovered on Appellant's external hard drive, along with his search and web history that include terms associated with the sexualization of women of legal age.[80]

Pornographic images of what appear to be adult women portrayed as under the age of eighteen were discovered on Appellant's external hard drive.[81] Appellant's personal cell phone contained instructions and information from The Onion Routing project (Tor), an open-source privacy network that enables anonymous web browsing and access to the dark web.[82] However, no evidence was presented showing that Appellant used search terms associated with child pornography to locate or download the images found in unallocated space or cache files. The Government's expert did not find any search terms on Kelley's computer specifically linked to these images.[83] Appellant's affidavit further clarifies he believed the category of porn he was downloading from FrostWire was legal and involved women of legal age.[84]

There was no evidence that Appellant attempted to save, email, print, or otherwise preserve the images found in the cache and unallocated space.[85] Furthermore, the Government presented

[78] XVII at 6 (Gov. Resp. to Def. Motion to Exclude M.R.E. 404(b) (see encl. 4 (sealed, per App. Ex. XVII).
[79] Pros. Ex. 11, 12 (CD3 and CD4).
[80] XVII at 7 (Gov. Resp. to Def. Motion to Exclude M.R.E. 404(b) (see encl. 9 (sealed, per App. Ex. XVII).
[81] XVII at 8 (Gov. Resp. to Def. Motion to Exclude M.R.E. 404(b) (see encl. 10 (sealed, per App. Ex. XVII).
[82] XVII at 10 (Gov. Resp. to Def. Motion to Exclude M.R.E. 404(b) (see encl. 6, 12 (sealed, per App. Ex. XVII).
[83] R. at 701 (Art. 39(a) of 17 May 2022) (cross examination of Special Agent D.R.).
[84] App. Ex. XVI at 7 (Appellant's Affidavit).
[85] R. at 217 (Art. 39(a) of 19 May 2023) (cross examination of Special Agent C.C.).

no evidence that Appellant took any steps to conceal or delete the images. Mr. [redacted] admitted under cross-examination that he could not determine if the images were ever viewed by Appellant.[86] He was uncertain whether the images were part of an automatically cached webpage or if Appellant had interacted with them in any manner indicating awareness of their presence.[87]

Summary of Argument

This case presents an alarming blend of significant issues, many of which on their own would justify setting aside the findings and sentence. In the aggregate, these issues were so prejudicial to Appellant that the only meaningful relief is to set aside the conviction with prejudice. The seven assignments of error in this case arise from four primary factual or legal scenarios.

First, the panel President's statement to the Military Judge specified that the members voted on both specifications of the Charge, and voted to acquit on both because they had not reached the necessary three-fourths majority vote on any image. The panel's vote resulted in a full acquittal. Without asking the panel President to clarify any confusion, the Military Judge erroneously re-instructed the members on the voting procedures, and sent the members back for more deliberations after they told the Court-Martial they already voted to acquit. The members then returned, having voted again but this time to convict. The members improperly reconsidered their vote without first requesting reconsideration instructions as directed. Furthermore, the Military Judge did not instruct the members on reconsideration, or otherwise cure this issue.

Second, the Findings Worksheet listed eleven images, but Specification 1 only listed eight. The number of images is one major change to the specification that took place post-referral. Another significant variance was the fact that the four added images were different from those

[86] R. at 221 (Art. 39(a) of 19 May 2022).
[87] R. at 76 (Art. 39(a) of 20 May 2022).

noticed as being part of Specification 1. One of those four images was actually a PDF file, "Hebes," which itself contained as many as eight additional images of child pornography within a collage of images. Thus, Appellant was charged with possessing eight images (as identified in the Article 32 and referral processes), yet eleven appeared on the Findings Worksheet, and from those eleven named images, the members viewed a total of eighteen actual images from which they were permitted to base their findings.

Third, the Military Judge erroneously permitted these four images to be added to the Findings Worksheet to prove knowing and wrongful possession of child pornography without requiring the Government to amend the charge sheet, conduct an Article 32 preliminary hearing, seek Article 34 advice prior to referral, or arraign Appellant on the amended charge for these additional offenses. In so doing, the Government and Military Judge misused the concept of *res gestae*. *Res gestae* is an evidentiary principle that permits admission of evidence to prove the crime itself (as opposed to other limited uses). It is not, and should not have been considered, a back-door to amending the charge sheet without all of the procedural due process required by the Rules for Courts-Martial. This was a fundamental violation of due process, which severely prejudiced Appellant because it resulted in his conviction.

Initially, the Government was only going to use this evidence for permitted M.R.E. 404(b) purposes (and later to prove the elements—*mens rea*—for the eight images that were properly charged, noticed, and referred). However, the Military Judge's evidentiary rulings should not have resulted in the addition of these offenses to the Findings Worksheet as a *de facto* amended charge. The Military Judge misunderstood the Government's intended uses of this evidence, the corresponding defense position, and he had multiple opportunities to resolve that confusion, but erroneously failed to do so.

If this Court takes the view that Civilian Defense Counsel waived Appellant's due process rights including notice, proper charging, Article 32 and Article 34 procedures, proper referral, and arraignment for each of the four images ostensibly added to the specification post-referral, and without specific colloquy from the Military Judge, then the only conclusion that can follow is that Appellant received ineffective assistance from his counsel. Even if the Court finds Civilian Defense Counsel did waive the bulk of Appellant's due process rights, neither he, the Trial Counsel, nor the Military Judge had the authority to refer the additional images to this Court-Martial, and the Convening Authority took no such action to refer the additional images. Thus, the offenses that served as the basis for Appellant's conviction were never properly before the Court-Martial, and the Court lacked jurisdiction.

Lastly, the evidence was legally and factually insufficient to prove that Appellant could have knowingly possessed the images at issue because they existed in cache memory.

Argument

I.

APPELLANT WAS ACQUITTED.

Standard of Review

Questions of law are reviewed *de novo*.[88]

Law and Analysis

After deliberating, the members provided a note to the Court, saying, "[w]e've voted on both specs. but we don't have ¾ majority on any individual files. We weren't clear on how to come to consensus on each file (page 3 of 3). Or if that's required."[89]

[88] *United States v. Pease*, 75 M.J. 180, 184 (C.A.A.F. 2016).
[89] App. Ex. 107.

Rule for Courts-Martial 921(c)(3) states, "*Acquittal*. If fewer than three-fourths of the members present *vote* for a finding of guilty, *a finding of not guilty* <u>*has resulted*</u> as to the charge or specification on which the vote was taken."[90] The members told the Court that they voted, and that fewer than three-fourths of the members voted to convict on *any* individual files. That is a *finding* of acquittal under Rule for Courts-Martial 921(c)(3).[91] Courts-martial are not required to reach a unanimous verdict, as is common in civilian courts.[92]

At trial, Civilian Defense Counsel moved orally for appropriate relief, which he later supplemented in writing.[93] He sought to set aside the findings of guilt based on the "apparent announcement of [a] not-guilty determination by the members."[94] The military judge issued a ruling[95] and an amended ruling,[96] finding that the members' question to the Military Judge was not an *announcement* of findings. However, The Military Judge never directly addressed the issue Appellant now presents: "was Appellant acquitted?"

The only potential ambiguity in the members' question arises when reading, "[w]e weren't clear on how to come to consensus on each file (page 3 of 3) or if that's required."[97] The Military Judge stated in his ruling that there were indications both that the members had voted, and had not voted. He said:

> This comment may have referred to a number of stages of the deliberative process, including the "full and deliberative discussion" envisioned by R.C.M. 92l(d). The

[90] Rule for Courts-Martial 921(c)(3), Manual for Courts-Martial (2019).
[91] Rule for Courts-Martial 921(c)(3), Manual for Courts-Martial (2019).
[92] *United States v. Anderson*, 83 M.J. 291, 296 (C.A.A.F. 2023), *cert. denied*, 144 S. Ct. 1003, 218 L. Ed. 2d 21 (2024).
[93] R. at 152-54.
[94] App. Ex. 110 (Def. Post-Trial Motion for Appropriate Relief).
[95] Appellate Ex. 117 (Ruling on Def. Post-Trial MFAR).
[96] Appellate Ex. 119 (Amended Ruling on Def. Post-Trial MFAR).
[97] App. Ex. 107.

> statement "we weren't clear on how to come to consensus" *suggests that they had not voted regarding the specific files.*[98]

This sits in contrast with the Military Judge's other statement:

> The question *indicates that the members had voted on the specifications* but neither the question nor CDR [H.], the panel president, indicated whether the panel had found the accused guilty or not guilty of either of the offenses and whether the findings worksheet had been completed.[99]

Just because the members could not reach a consensus to convict does not mean that they did not vote. If anything, that reiterates their vote resulted in an acquittal. There is no need for the Military Judge's guesswork because the members told the Military Judge "we've voted on both specs" and that they "don't have ¾ majority on any individual files."[100] In his analysis, the Military Judge repeats that the panel President did not "indicate" whether the members found the accused guilty or not guilty. They may not have said the magic words "we find," but they certainly said "we've voted." Furthermore, the Miliary Judge refused to let the panel President ask questions.[101]

Nonetheless, the Military Judge noted, "there was significant ambiguity about the nature of the [members'] question and where in the deliberative process the members were at the time of the question."[102]

> At that point, the military judge should have confirmed with the panel president whether the panel formally voted on each of the three specifications of [the Charge]. Doing so could have been accomplished without disclosing the results of the vote on each specification and would also have provided complete information to the military judge, and the parties, in determining how to further instruct the panel.[103]

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[98] App. Ex. 119 at 6-7 (emphasis added) (Amended Ruling on Def. Post-Trial MFAR).
[99] App. Ex. 119 at 6 (emphasis added).
[100] App. Ex. 107.
[101] R. at 143.
[102] Appellate Ex. 119 (Amended Ruling on Def. Post-Trial MFAR).
[103] *United States v. Reyes-Lesmes*, No. ARMY 20180396, 2020 WL 6533831, at *5 (A. Ct. Crim. App. Nov. 4, 2020).

As the Army Court of Criminal Appeals noted above, if the Military Judge was unclear about what the panel President meant, he should have asked. Without inquiring into how any individual panel member voted, the Military Judge could have asked:

(1) Did every member vote on both specifications?
(2) Did every member vote on each individual file?
(3) Did six or more members vote to convict on any individual file?
(4) Do the members have other questions for the Court at this time?

Instead of engaging in the required colloquy, the Military Judge flatly refused to clarify the ambiguity he saw with the members' statement. Then, the Military Judge erroneously sought to determine whether the reading of the members' question was an announcement of an acquittal.[104]

There are a number of cases discussing reconsideration and what constitutes an *announcement*,[105] but those issues are irrelevant because announcement is not the determining factor for when a *finding* has been made under Rule for Courts-Martial 921 (c)(3).[106] Announcement is the point after which such a finding may no longer be *reconsidered*, if sought

[104] Appellate Ex. 119 (Amended Ruling on Def. Post-Trial MFAR).
[105] *United States v. McAllister*, 42 C.M.R. 22, 23 (1970) (finding no announcement where the members voted to acquit but with one abstention); *United States v. London*, 15 C.M.R. 90 (1954); *United States v. Boswell*, 23 C.M.R. 369, 372 (1957) (*see Boswell's* summary of *London* at 373); *United States v. King*, 22 C.M.R. 856, 858 (1956); *United States v. Augspurger*, 61 M.J. 189 (C.A.A.F. 2005) (It is the responsibility of military judges to ensure that any ambiguities in findings are clarified before the findings are announced, and if they fail to do so, the appellate courts cannot rectify that error); *United States v. Perez*, 40 M.J. 373 (C.M.A. 1994); *United States v. Parker*, No. ARMY 20180672, 2021 WL 306493, at *1 (A. Ct. Crim. App. Jan. 29, 2021); *United States v. Reyes-Lesmes*, No. ARMY 20180396, 2020 WL 6533831, at *3 (A. Ct. Crim. App. Nov. 4, 2020).
[106] Rule for Courts-Martial 921(c)(3), Manual for Courts-Martial (2019).

by the members.[107] The members' second vote differed from the *known* findings that resulted from their first vote.[108] However, the findings were never properly reconsidered.[109]

Conclusion

The members voted to acquit Appellant because they voted "on both specs" but did not "have a ¾ majority on any individual files." This was a *finding* of acquittal under Rule for Courts-Martial 921(c)(3). This finding was never properly reconsidered under Rule for Courts-Martial 924. This error was highly prejudicial to Appellant, and directly resulted in a conviction for offenses for which he had just been found not guilty. Therefore, this Court must set aside the findings of guilt in Specification 1 with prejudice.

II.

APPELLANT WAS DEPRIVED OF DUE PROCESS WHEN HE WAS CONVICTED OF OFFENSES DIFFERENT FROM: THOSE CHARGED IN SPECIFICATION 1, THOSE THAT SERVED AS THE BASIS FOR THE ARTICLE 32 PRELIMINARY HEARING AND THE PRELIMINARY HEARING OFFICER'S PROBABLE CAUSE DETERMINATION, AND THOSE THAT SERVED AS THE BASIS FOR THE ARTICLE 34 ADVICE AND REFERRAL.

Standard of Review

Courts review *de novo* whether constitutional errors were harmless beyond a reasonable doubt.[110]

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[107] Rule for Courts-Martial 924, Manual for Courts-Martial (2019).
[108] The fact that the results of the first vote were known in this case is a key fact that distinguishes this case from the reconsideration cases cited above.
[109] See Issue V (discussing the Military Judge's erroneous instructions to the Members during deliberations, and on the topic of reconsideration).
[110] *United States v. Grijalva*, 55 M.J. 223 (C.A.A.F. 2001) (*citing Arizona v. Fulminante*, 499 U.S. 279, 295 (1991)).

Law and Analysis

"No principle of procedural due process is more clearly established than that notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge, if desired, are among the constitutional rights of every accused in a criminal proceeding in all courts, state or federal."[111] Appellant was convicted of offenses for which he was never charged. As such, "[t]he rights at issue in this case are constitutional in nature."[112] The Court in *Girouard* continued,

> The Fifth Amendment provides that no person shall be "deprived of life, liberty, or property, without due process of law," U.S. Const. amend. V, and the Sixth Amendment provides that an accused shall "be informed of the nature and cause of the accusation," U.S. Const. amend. VI. Both amendments ensure the right of an accused to receive fair notice of what he is being charged with. *See Apprendi v. New Jersey,* 530 U.S. 466, 476, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); *Cole v. Arkansas,* 333 U.S. 196, 200, 68 S.Ct. 514, 92 L.Ed. 644 (1948); *see also Jones,* 68 M.J at 468. **But the Due Process Clause of the Fifth Amendment also does not permit convicting an accused of an offense with which he has not been charged**. *See United States v. Marshall,* 67 M.J. 418, 421 n. 3 (C.A.A.F.2009) (**noting the government's dual due process obligations of fair notice and "proof beyond a reasonable doubt of the *offense alleged*"** [emphasis added]). As the Supreme Court explained in *Patterson v. New York,* "the Due Process Clause requires the prosecution to prove beyond a reasonable doubt all of the elements included in the definition of the offense *of which the defendant is charged*." 432 U.S. 197, 210, 97 S.Ct. 2319, 53 L.Ed.2d 281 (1977) [emphasis added]; *see also United States v. Wilcox,* 66 M.J. 442, 448 (C.A.A.F.2008) ("To satisfy the due process requirements of the Fifth Amendment, the Government must prove beyond a reasonable doubt every element of the *charged offense*." [emphasis added]).[113]

While charged with wrongfully possessing eight images of child pornography, Appellant stands convicted of possessing two other images of child pornography. Although the specification lacks specific information regarding the identification of the eight images, this was addressed

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[111] *United States v. Fosler*, 70 M.J. 225 (C.A.A.F. 2011) (*citing Cole v. State of Arkansas*, 333 U.S. 196 (1948)).
[112] *United States v. Girouard*, 70 M.J. 5, 10 (C.A.A.F. 2011).
[113] *United States v. Girouard*, 70 M.J. 5, 10 (C.A.A.F. 2011).

during the Article 32 hearing.[114] The Government made clear at that point what eight specific images made up the charged offense and against which the Appellant must defend.

It is these eight images upon which the PHO made his probable cause determination and recommendation.[115] It is these eight images the Staff Judge Advocate considered in the PHO report when providing her Article 34 Advice to the Convening Authority regarding referral.[116] As such, these eight images are the ones the Convening Authority used when referring the Charge and Specifications to the General Court-Martial. These are the eight images upon which Appellant was arraigned.[117]

While Appellant stands convicted of Specification 1 and The Charge, it is not for possession of any of these eight images. To the contrary, Appellant stands convicted for the offense of possessing two *other* images of child pornography. These two other images were never included in: (1) a preferred Charge;[118] (2) an Article 32 investigation or probable cause determination;[119] (3) an SJA recommendation under Art. 34;[120] (4) a referred Charge;[121] or (5) a Charge on which he was arraigned.[122] In fact, the Specification on which he was convicted was never amended[123] to reflect that the Government added additional images to the eight used to support the charge.

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[114] Audio Recording of Art. 32 Preliminary Hearing at timestamp 26:14-26:35; Art. 32 Report at 1.
[115] Art. 32 Report at 1.
[116] Staff Judge Advocate's Pretrial Art. 34 Advice memo 5811 of 26 May 2022.
[117] R. at 12-14 (Art. 39(a) of 21 July 2022 - arraignment).
[118] Art. 30, UCMJ (10 U.S.C. § 830) (Charges and Specifications).
[119] Art. 32, UCMJ (10 U.S.C. § 832) (Preliminary hearing required before referral to GCM).
[120] Art. 34, UCMJ (10 U.S.C. § 834) (Advice to convening authority before referral for trial).
[121] Rule for Courts-Martial 601, Manual for Courts-Martial (2024) (Referral).
[122] Rule for Courts-Martial 904, Manual for Courts-Martial (2024) (Arraignment).
[123] Rule for Courts-Martial 603, Manual for Courts-Martial (2024); *see also* Rule for Courts-Martial 601 (e)(2) (joinder of offenses).

But how can that be true? Pursuant to the Supreme Court's decision in *Dunn v. United States*, "[f]ew constitutional principles are more firmly established than a defendant's right to be heard on the specific charges of which he is accused."[124] As recounted elsewhere in this brief, it appears this violation of Appellant's fundamental due process rights, afforded him by the Constitution and the UCMJ, was caused by failures on the part of the Military Judge, Trial Counsel, and at times the Defense Counsel.

The Trial Counsel, while citing to the evidentiary rule of *res gestae*, adopted a completely unsupported and unprecedented theory that as long as someone is charged with possessing child pornography, any images of child pornography possessed by an accused can be added as substantive offenses at any time in the proceeding—even when they are different images from those the Government explicitly identified as the basis for the Specification. [125]

The Military Judge, and perhaps even the Trial Counsel, utterly failed to grasp the significance of the Government's proposal. Instead of clarifying the issue and possibly realizing the due process implications of what the Government was doing, he chose to treat an ambiguous comment made by Appellant's counsel in an email as effectively waiving or conceding the issue.[126] In an unprecedented decision, by merely allowing the Government to add images to the Findings Worksheet, the Miliary Judge permitted the Government to add offenses that Appellant had neither been charged with nor had ever, or would ever, appear on a charge sheet.

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[124] *Dunn v. United States*, 442 U.S. 100, 106 (1979).
[125] App. Ex. XIV at 22 (Gov. MRE 404(b) notice of 08Aug22 (dated 2021); App Ex. XV (Gov. Resp. to Def. Motion to Exclude MRE 404(b) of 11Oct22; App. Ex. XVII (Gov. Resp. to Def. Motion to Exclude MRE 404(b) of 13Dec22); R. at 1 (Art. 39(a) of 20Dec22 – MRE 404(b) motions hearing).
[126] App. Ex. XIX (Ruling on Def. Motion to Exclude MRE 404(b) of 11Oct22); R. at 1 (Art. 39(a) of 20Dec22 – MRE 404(b) motions hearing); App. Ex. 47 (Military Judge's email re: Findings Worksheet); App. Ex. 48 (Defense's email response to Military Judge's email).

Regarding *res gestae*, the CAAF in *St. Jean* defined this term "as '[t]he events at issue, or other events contemporaneous with them."[127] There may be other independent bases to admit evidence, such as for MRE 404(b) purposes, but *res gestae* is an evidentiary principle that permits admission of evidence to prove the crime itself. It is not, and should not be considered, a back-door to amending a charge sheet without all of the procedural due process required by the Rules for Courts-Martial. The best examples of potential *res gestae* here would be evidence of Appellant's internet search terms as helping to establish Appellant's mens rea, or the phone applications Tor and FrostWire as tending to show that Appellant may have used these applications to access contraband online. This is in addition to any permissible MRE 404(b) use for such evidence.

Hypothetical to Illustrate *Res Gestae*: Receipt of stolen property under Art. 122a, UCMJ

To illustrate, consider a hypothetical servicemember convicted of receiving stolen property under Art. 122a, UCMJ. That offense also includes elements of wrongful and knowing possession of certain contraband (stolen) items, similar in a way to Specification 1 here. In this example, the Government charged the appellant with receiving two stolen power tools. At the Article 32 hearing, the Government said the two tools for the specification were a power drill, and a jig saw. These were the only two tools noticed as being part of the specification.

These tools were of the same brand and from a matching line of products, and had the initials, [redacted] written on them. In its MRE 404(b) notice, the Government informed the defense that it intended to use additional evidence properly seized from appellant's truck—a power sander and its box—as evidence of the charged offense (receipt of the other two tools) as *res gestae*. The

[127] *United States v. St. Jean*, 83 M.J. 109, 112 (C.A.A.F. 2023) (citing *Black's Law Dictionary* 1565 (11th ed. 2019).

power sander had the initials [redacted] written on it, but also included the former owner's full name (e.g., [redacted], and it came in a box meant to carry two additional tools—a power drill, and a jig saw like the ones charged.

The Government in this hypothetical could properly use this evidence under MRE 404(b) to prove the appellant's knowledge that [redacted] meant [redacted] on the two charged tools, or perhaps lack of accident or mistake. Likewise, the Government could try to use this evidence as proof of the crime itself as *res gestae*. The tools all fit into the box with the power sander, they are of the same product line and color, etcetera. Further, the victim [redacted] testified that all three items were in the box when it was stolen. The thief struck an immunity deal with the assistance of counsel and testified that he sold all three items together in the box to the appellant.

While the Government in this example could characterize this evidence as *res gestae* to properly admit it to prove the elements of the charged offense (receipt of stolen property, to wit: a power drill and jig saw), the Government and Military Judge could not rely on *res gestae* or MRE 404(b) to add the power sander to the findings worksheet or otherwise as a means of amending the charge (without withdrawing and re-preferring and referring anew under R.C.M. 603). They are all tools, and they were all stolen, but the appellant was never charged with receipt of *three* stolen power tools, or having stolen this power sander specifically. Likewise, such a charge was never referred.

As discussed in Issue III,[128] the Government here wanted Hebes PDF to be considered as a new offense because the depicted images were much more damning,[129] and the Government said

[128] Issue III (Lack of jurisdiction after the Military Judges erroneously permitted additional offenses to be considered as part of Spec. 1).
[129] R. at 74 (Art. 39(a) of 21 May 2023) (Civilian Defense Counsel said on closing argument in reference to the Hebes.pdf, "it is disgusting. It is the only obvious child pornography in this case. It's got like little kids, and its bad.").

there were more indicia of possession and control over that file than the eight charged images.[130] The Government made a strategic mistake in selecting the offenses it chose to prosecute. Rather than follow Rule for Courts-Martial 603 to amend the Charge Sheet, the Military Judge erroneously permitted a *de facto* amendment; any such amendment was never referred, nor in compliance with Art. 32 or Art. 34. This not only created the jurisdictional problem discussed in Issue III,[131] but the Military Judge also violated Appellant's due process right to notice and to be convicted of only crimes for which he was charged.[132]

"[T]here is a presumption against the waiver of constitutional rights, and for a waiver to be effective it must be clearly established that there was an intentional relinquishment or abandonment of a known right or privilege."[133] For the same reasons articulated in Issues III and VI, neither Appellant nor his Counsel intentionally relinquished or abandoned Appellant's rights to due process, proper notice, or to be convicted only of offenses for which he has been properly charged. The Military Judge did not engage in a waiver colloquy with Appellant inquiring as to any such waiver.

Conclusion

The Military Judge's failure to ensure Appellant received due process was not harmless beyond a reasonable doubt,[134] as the lack of due process not only contributed to, but likely directly

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[130] R. at 116 (Gov. rebuttal) ("[T]he Hebes PDF had to have been opened to have been created into the cache, to have been created into a thumbnail."); App. Ex. XVII at 7 (Gov. Resp. to Def. Motion to Exclude MRE 404(b) of 13Dec22) ("Through testimony, the Government will be able to provide that the location that the Hebes.pdf was found in the "Downloads" folder of the Accused's personal cell phone, which requires action by the user to open, view, and download the document onto their phone.").
[131] *United States v. Reese*, 76 M.J. 297, 301 (C.A.A.F. 2017).
[132] *United States v. Girouard*, 70 M.J. 5, 10 (C.A.A.F. 2011).
[133] *Id.* (citing *United States v. Harcrow*, 66 M.J. 154, 157 (C.A.A.F. 2008)).
[134] *Grijalva*, 55 M.J. at 223.

resulted in Appellant's only convictions. "Conviction upon a charge not made would be sheer denial of due process."[135] This is exactly what happened in Appellant's case and as such his convictions must be dismissed with prejudice.

III.

THE COURT-MARTIAL LACKED JURISDICTION BECAUSE THE MILITARY JUDGE ERRONEOUSLY INSTRUCTED THE MEMBERS ON ADDITIONAL OFFENSES TO BE CONSIDERED AS PART OF SPECIFICATION 1 AFTER REFERRAL, OVER DEFENSE OBJECTIONS, WITHOUT WITHDRAWING, PREFERRAL ANEW, AND WITHOUT SUBSEQUENT REFERRAL, AS REQUIRED BY R.C.M. 603.

Standard of Review

Appellate courts "review jurisdictional questions *de novo*."[136]

Law and Analysis

"The due process principle of fair notice mandates that 'an accused has a right to know what offense and under what legal theory' he will be convicted."[137] Furthermore, "the Due Process Clause of the Fifth Amendment also does not permit convicting an accused of an offense with which he has not been charged."[138] "If during the trial there is evidence that the accused may be guilty of an untried offense not alleged in any specification before the court-martial" it was the Military Judge's responsibility to ensure the court-martial proceeded "with the trial of the offense charged."[139] Under Rule for Courts-Martial 603, after referral, a major change may not be made

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[135] *De Jonge v. State of Oregon*, 299 U.S. 353 (1937).
[136] *United States v. Ballan*, 71 M.J. 28, 32 (C.A.A.F. 2012).
[137] *United States v. Tunstall*, 72 M.J. 191, 192 (C.A.A.F. 2013) (citing *United States v. Jones,* 68 M.J. 465, 468 (C.A.A.F. 2010)); *see also*, *United States v. Medina,* 66 M.J. 21, 26–27 (C.A.A.F. 2008); *United States v. Wilkins*, 71 M.J. 410 (C.A.A.F. 2012).
[138] *Id*. (citing *United States v. Girouard,* 70 M.J. 5, 10 (C.A.A.F. 2011)); *see also*, *Cole v. State of Ark*., 333 U.S. 196 (1948).
[139] Rule for Courts-Martial 801 (d), Manual for Courts-Martial (2019).

to a charge or specification over the objection of the accused unless the charge or specification is withdrawn, amended, and referred anew.[140]

> The practical effect is that if a change [to a charge] is major and the defense objects, the charge has no legal basis and the court-martial may not consider it unless and until it is "preferred anew," *and subsequently referred* [emphasis added]. *See* R.C.M. 201(b)(3). To the extent our precedent has required a separate showing of prejudice under these circumstances, it is overruled: absent "preferr[al] anew" *and a second referral* there is no charge to which jurisdiction can attach, and Article 59(a), UCMJ, 10 U.S.C. § 859(a) (2012), is not, in fact, implicated.[141]

A. Appellant was not Charged with Knowing and Wrongful Possession of the Two Images for which he was Convicted.

The Charge Sheet does not identify any of the original eight noticed images that the Government stated formed the basis of Specification 1 of the sole Charge.[142] However, Appellant concedes that he had notice of these original eight images because they were identified during the Article 32, and that a Bill of Particulars was not necessary as to those eight images.[143] However, four different images were ultimately added to the Findings Worksheet *after* the Article 32 preliminary hearing and *after* referral.[144] The panel's finding of guilt specified two images total, and they came from these four additional images.

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[140] Rule for Courts-Martial 603, Manual for Courts-Martial (2024 ed.).
[141] *United States v. Reese*, 76 M.J. 297, 301 (C.A.A.F. 2017).
[142] Audio Recording of Art. 32 Preliminary Hearing at timestamp 26:14-26:35 (emphasis added); Art. 32 Report at 1.
[143] There is discussion in the record (App. Ex. 47; R. at 979) about ensuring this Court could conduct a proper factual sufficiency review under Art. 66, UCMJ. The Military Judge relied upon *United States v. Dow*, No. ARMY 20200462, 2022 WL 2161607, at *2 (A. Ct. Crim. App. June 14, 2022) as to why each *charged* image should be listed on the Findings Worksheet. However, *Dow* does not serve as authority to simply add images - uncharged and unreferred crimes – to the Findings Worksheet. See Issue IV (fatal variance).
[144] Note that only seven of the eight noticed images appear on the Findings Worksheet. When the Government added four uncharged images, the total came to eleven, not twelve.

The Military Judge erroneously permitted these four images to be included on the Findings Worksheet and erroneously instructed the members to make findings for these images. This furthered the Government's attempt to make a major change to Specification 1 *de facto*, after referral. Additionally, the Charge and Specification 1 were never actually withdrawn, amended, re-preferred, or referred anew to reflect the addition of these four images to the Specification.

B. <u>The Two Images for which Appellant was Convicted Were Not Properly Referred to this Court-Martial.</u>

"The law is well settled that '[a]lthough the [referral] order is a jurisdictional prerequisite, the form of the order is not jurisdictional.'"[145] In *Ballan*, a military judge, sitting as a general court-martial, convicted appellant, pursuant to his pleas, of one specification of sodomy with a child under the age of twelve, one specification of indecent acts with a child, and eight specifications of indecent acts with another, in violation of Articles 125 and 134, UCMJ.[146] The CAAF reasoned that:

> [c]hanging the charge from a violation of Article 120, UCMJ, to a violation of Article 134, UCMJ, was, admittedly, a major change. *See* R.C.M. 603(a). And R.C.M. 603(d) provides that major "[c]hanges or amendments to charges or specifications . . . may not be made over the objection of the accused unless the charge or specification affected is preferred anew.

The CAAF considered the appellant's actions in *Ballan* as agreeing to an amendment to the charge and specification, even though the charge sheet itself was not physically amended.[147] However, the appellant in *Ballan* "not only did not object to the change, he proposed the change in his pretrial agreement, explained to the military judge why he was guilty before the plea was

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[145] *United States v. Ballan*, 71 M.J. 28, 32 (C.A.A.F. 2012) (where Colonel Brubaker argued on behalf of Appellee) (citing *United States v. Wilkins*, 29 M.J. 421, 424 (C.M.A. 1990); *see also*, *United States v. Parker*, 59 M.J. 195 (C.A.A.F. 2004); *United States v. Simmons*, 82 M.J. 134 (C.A.A.F. 2022).
[146] *Ballan*, 71 M.J. at 32.
[147] *Id*. at 32.

accepted, and benefited from the amendment."[148] But unlike *Ballan* and the *Wilkins* case it cites, Appellant did not enter into any plea agreement or explicitly waive his right.[149]

In fact, Appellant contested the allegations here, and there is no Convening Authority action which expressly or implicitly referred the new offenses – the added images to the Findings Worksheet – to this Court-Martial. A "convening authority or superior competent authority may withdraw charges from a court-martial at any time before findings are announced," and "such charges may be re-referred to another court-martial, 'unless the withdrawal was for in improper reason."[150] However, the Convening Authority did not withdraw, amend, re-prefer, or refer charges anew. Regardless of how this Court interprets Civilian Defense Counsel's actions, these additional offenses were never referred to Appellant's Court-Martial. Under *Reese*, that means the Court lacked jurisdiction over the new offenses.[151]

C. Appellant was prejudiced by the Military Judge's de facto inclusion in Specification 1 of these particular images.

Under Rule for Court-Martial 603(b)(1), "a major change is one that adds a party, *an offense*, or a *substantial matter not fairly included in the preferred charge or specification, or that is likely to mislead the accused as to the offense charged"* [emphasis added].[152] The addition of four different images of possible child pornography constituted a major change. Each image depicted a separate offense, each image was found in a different location, with different metadata,

[148] *Id*. at 32.
[149] Further, the Court in *Ballan* looked to both the appellant's conduct, as well as that of the convening authority. The argument is significantly weaker here that Appellant agreed to the added charges because there is no plea agreement or unambiguous waiver. Likewise, the Convening Authority in *Ballan* implicitly referred the lesser Article 134 specification to the court-martial when he or she accepted the plea agreement.
[150] *United States v. Haagenson*, 52 M.J. 34, 35 (C.A.A.F. 1999).
[151] *United States v. Reese*, 76 M.J. 297, 301 (C.A.A.F. 2017).
[152] Rule for Courts-Martial 603 (b), Manual for Courts-Martial (2024 ed.).

required different analysis from the digital forensic experts, and arguably would require a different defense theory.[153] The Military Judge failed to frame the Government's intended use of these images as an R.C.M. 603 issue. Had he done so, he might have had the opportunity to engage in a colloquy with Appellant and unambiguously ask his counsel whether the Defense waived these major changes.

The addition of the four images to the Findings Worksheet had the effect of adding offenses to Specification 1, offenses which could have been charged as separate crimes. As noted, one of the four added images was the Hebes PDF, for which Appellant was convicted. This file actually included at least eight images of possible child pornography in a collage format. These substantial matters were not fairly included in the eight specific images the Government said constituted Specification 1. They increased the severity of the alleged offenses because they increased the number of alleged crimes, and the nature of the child pornography depicted in the Hebes PDF was significantly more prejudicial than the other images. Regardless, under *Reese*, a showing of prejudice is not required.[154]

D. Although there was much confusion regarding the Government's intended use of the additional images and permissible scope permitted by the Military Judge, neither Appellant nor Civilian Defense Counsel intentionally relinquished or abandoned Appellant's due process rights generally, or to proper preferral, Article 32, Article 34, referral, or arraignment for these offenses.

"[T]here is a presumption against the waiver of constitutional rights, and for a waiver to be effective it must be clearly established that there was an intentional relinquishment or abandonment of a known right or privilege."[155] There was no intentional relinquishment or

[153] R. at 153 (Art. 39(a) of 20 Dec 2022).
[154] *United States v. Reese*, 76 M.J. 297, 301 (C.A.A.F. 2017).
[155] *United States v. Girouard*, 70 M.J. 5, 10 (C.A.A.F. 2011) (citing *United States v. Harcrow*, 66 M.J. 154, 157 (C.A.A.F. 2008)).

abandonment by Appellant or his Counsel of his right to have these additional offenses properly charged, presented to an Article 32 preliminary hearing, referred, or to be arraigned on these offenses. The Military Judge failed to engage in a waiver colloquy with Appellant inquiring as to any waiver of his right to an Article 32 proceeding or any of these due process rights.[156]

Civilian Defense Counsel said during the MRE 404(b) motion hearing that the defense "withdraws its original objection or motion, basis of defective notice; that's been cured, clearly. The remaining issue, of course, is the *Reynolds* and *Wright* tests that we've asked the court to exclude certain piece[s] of evidence."[157] However, he did not waive notice as to the later-proposed use of the four new images as newly charged offenses; he merely waived his initial objection for defective notice under M.R.E. 404(b) for the Government's failure to articulate which exceptions under the Rule apply, which they cured in their subsequent filings before the Article 39(a) motions hearing. Having since received proper M.R.E. 404(b) *notice*, Civilian Defense Counsel waived that issue, and shifted his attention to the M.R.E. 404(b) analysis under *Reynolds* and *Wright*.

Similarly, Civilian Defense Counsel said, "[w]e don't intend to mount a challenge to say that it doesn't meet the specifications language of eight *images* because it's images on a single *document* or it's a *document*, a *PDF document*. We understand the Government has some latitude to carry its burden."[158] This is not a waiver of the number of offenses charged; he was considering whether a potential change from "images" (the charging language) to "document" or "PDF" to reflect the nature of the Hebes PDF not being an image was something he should object to. Civilian

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[156] *See*, Article 32 Waiver Colloquy (2-7-8), Military Judges' Benchbook, www.jagcnet.army.mil/EBB/. There is only one colloquy with Appellant in the transcript on a waiver issue involving discovery (R. at 474-475 (Art. 39(a) of 16 May 2023).
[157] R. at 149 (Art. 39(a) of 20 December 2022).
[158] R. at 151 (emphasis added) (Art. 39(a) of 20 Dec 2022).

Defense Counsel later decided that the Government could get a variance instruction if that distinction in terms became an issue.[159]

Civilian Defense Counsel again says he and co-counsel considered arguing the PDF is "a *document* and not *images*, and they charged eight *images*, but then they could get a variance instruction and be done, so."[160] However, any waiver here is limited by the Civilian Defense Counsel's statements and understanding of what was being discussed. He mentioned a potential variance between a later finding by the members that may say Appellant wrongfully possessed a "PDF" or "document" instead of an "image," as Appellant had been charged with. However, the Defense did not waive a broader potential variance between the content (acts and individuals depicted) of the findings and the charged offenses. Likewise, the Military Judge did not signal to him the need to amend the Charge Sheet based on R.C.M. 603 as a result of the Government's proposed major change to the Specification adding four images. A waiver of a potential variance in charged file types and file extensions does not encompass Appellate Defense Counsel's claim of a variance for the finding that Appellant possessed the specific Hebes PDF or "720d" image.

After the MRE 404(b) motions hearing, Civilian Defense Counsel sent an email to the Military Judge, and stated, "the defense withdraws its previous objection made on the record relating to evidence other than the NCMEC-identified images as eligible to prove the *elements* of the *charged offenses*."[161] Although at worst ambiguous as to what the Civilian Defense Counsel is referencing, and without covering the due process issues listed above, the Military Judge treated this email as having conceded to the Trial Counsel's proposal of adding uncharged misconduct as charged misconduct, agreeing that this can be accomplished without any additional due process,

[159] R. at 153 (Art. 39(a) of 20 Dec 2022).
[160] R. at 158 (emphasis added).
[161] App. Ex. 25 at 2 (emphasis added) (E-mail string: U.S. v. Kelley – Continuance).

to include amending the Charge Sheet, and that these new offenses can just be added to the Findings Worksheet. The only support for this previously undiscovered process is the Government's "*res gestae*" argument, this alleged email concession by Civilian Defense Counsel, and an erroneous reliance on *United States v. Dow*.[162]

Nothing in this email or elsewhere in the Record stated that Civilian Defense Counsel intentionally relinquished Appellant's right to the due process protections afforded by R.C.M. 603. He likewise did not intentionally relinquish Appellant's right to an Article 32 hearing for these additional offenses, nor was Appellant asked about such a waiver on the Record. Furthermore, he did not purport to waive proper referral, nor did he or any of the parties have authority to refer charges. He simply waived the use of this evidence to prove the *elements* of the *charged offenses*.[163] In essence, Civilian Defense Counsel merely recognized that, when properly applied, *res gestae* is a valid legal principle.[164]

The Military Judge then ruled on the defense's motion to exclude M.R.E. 404(b) evidence, denying the motion, but placing some limitations on the Government.[165] The Military Judge limited the scope of his ruling based on a misunderstanding of Civilian Defense Counsel's position:

> [O]n the record during the hearing on 20 December 2022, the Defense objected to the Government admitting images other than those images identified during the preliminary hearing to prove the charged offenses. Specifically, the Defense objected to the Government using images found on the "Hebes" .pdf document to prove the *charged offenses*. See AE XVI. This objection was based on insufficient

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[162] *United States v. Dow*, No. ARMY 20200462, 2022 WL 2161607, at *2 (A. Ct. Crim. App. June 14, 2022).
[163] App. Ex. 25 at 2 (emphasis added) (E-mail string: U.S. v. Kelley – Continuance).
[164] *United States v. St. Jean*, 83 M.J. 109, 112 (C.A.A.F. 2023) (citing *Black's Law Dictionary* 1565 (11th ed. 2019), the C.A.A.F. defined *res gestae* "as '[t]he events at issue, or other events contemporaneous with them.").
[165] App. Ex. XIX [emphasis added] (Military Judge's Ruling on Defense Motion to Exclude M.R.E. 404(b)).

> notice - that the Government had identified only eight *images* at the preliminary hearing to prove the charged offenses and should be precluded from thereafter expanding the *scope* due to insufficient notice. The Defense then withdrew *this* objection in an email following the 20 December 2022 hearing. See AE 25.

Civilian Defense Counsel perhaps read this with emphasis on the word *images* in the context of his stated concerns about a potential variance between the words "images" and "PDF," discussed above. Perhaps the Military Judge wrote this with emphasis in his mind on the words *only eight* to imply that the *scope* of the number of images was expanding (ignoring all other issues). This is one example of what the Record illustrates frequently: the Civilian Defense Counsel and the Military Judge kept talking past one another throughout the trial. Some fault may lie with Civilian Defense Counsel for not verifying or seeking clarity. But ultimately, it is the Military Judge who is responsible for ensuring that "the dignity and decorum of the proceedings are maintained," and for exercising "reasonable control over the proceedings to promote the purposes of [the Rules for Courts-Martial and the Manual for Courts-Martial]."[166]

Fast-forwarding a few months to the eve of trial, the Military Judge emailed the parties to inquire about the Findings Worksheet, saying:[167]

 [168]

[166] Rule for Courts-Martial 801(a), Manual for Courts-Martial (2019).
[167] App. Ex. 47 (Court's email re: Findings Worksheet).
[168] App. Ex. 47 (Military Judge's email of 11 May 23, subj, U.S. v. Kelley - Findings Worksheet).

Civilian Defense Counsel later replied with the following:

 [169]

In response to this reply, the Military Judge said:

[169] App. Ex. 48 at 2 (CDC's email of 14 May 22, replying to MJ email at App. Ex. 47).

 [170]

The last correspondence from Civilian Defense Counsel on this email chain reads:

 [171]

As noted, the Military Judge did not engage in any discussion about how or why the Government was permitted to amend the Charge Sheet *de facto*, adding four images[172] to the eight charged images. What authority did the Court or Government have to list more and different images on the Findings Worksheet than what was charged and referred? This was an improper burden-shifting–the Military Judge erroneously put the burden on Appellant to disprove the Court's interpretation of his email and statements at the motions hearing. Rather than requiring the

[170] App. Ex. 48 at 1 (MJ's email of 14 May 22, responding to CDC's earlier reply in App. Ex. 48).
[171] App. Ex. 48 at 1 (CDC's email of 14 May 22, responding to MJ's earlier reply in App. Ex. 48).
[172] As noted above – Hebes.pdf includes at least eight images in a collage, plus the other 3 added images, plus the remaining seven of the eight noticed images.

Government to abide by Constitutional due process and R.C.M. 603, the Military Judge required the defense to try to disprove the Court's erroneous interpretation of his email and statements during the motions hearing.

The Government wanted Hebes PDF to be considered as a new offense because the depicted images were much more damning,[173] and the Government said there were more indicia of possession and control over that file than the eight charged images.[174] Rather than fully reviewing and assessing the evidence prior to preferral, or following the correct, albeit slower, process of withdrawing and re-preferring (or charging separately), the Government tried to find a short-cut with the Findings Worksheet. In so doing, the Government was able to back-door the eight worst child pornography images into the trial, which they had in their possession since before preferral. The Government increased the quantity and quality of their charges, and bolstered their chances of success with evidence that had more indicia of access and control. They did so erroneously without withdrawing, amending, re-preferring, or referring anew the Charge Sheet.

At the start of trial, the Military Judge recapped the R.C.M. 802 sessions, noting his M.R.E. 404(b) ruling at App. Ex. XIX, and he highlighted Civilian Defense Counsel's above email of 14 May 2023 "about notice concerning what images would go to the members in support of the charges."[175] The Military Judge continued, saying:

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[173] R. at 74 (Art. 39(a) of 21 May 2023) (Civilian Defense Counsel said on closing argument in reference to the Hebes.pdf, "it is disgusting. It is the only obvious child pornography in this case. It's got like little kids, and its bad.").
[174] R. at 116 (Gov. rebuttal) ("[T]he Hebes PDF had to have been opened to have been created into the cache, to have been created into a thumbnail."); App. Ex. XVII at 7 (Gov. Resp. to Def. Motion to Exclude MRE 404(b) of 13Dec22) ("Through testimony, the Government will be able to provide that the location that the Hebes.pdf was found in the "Downloads" folder of the Accused's personal cell phone, which requires action by the user to open, view, and download the document onto their phone.").
[175] R. at 21 (Art. 39(a) session of 15 May 2023).

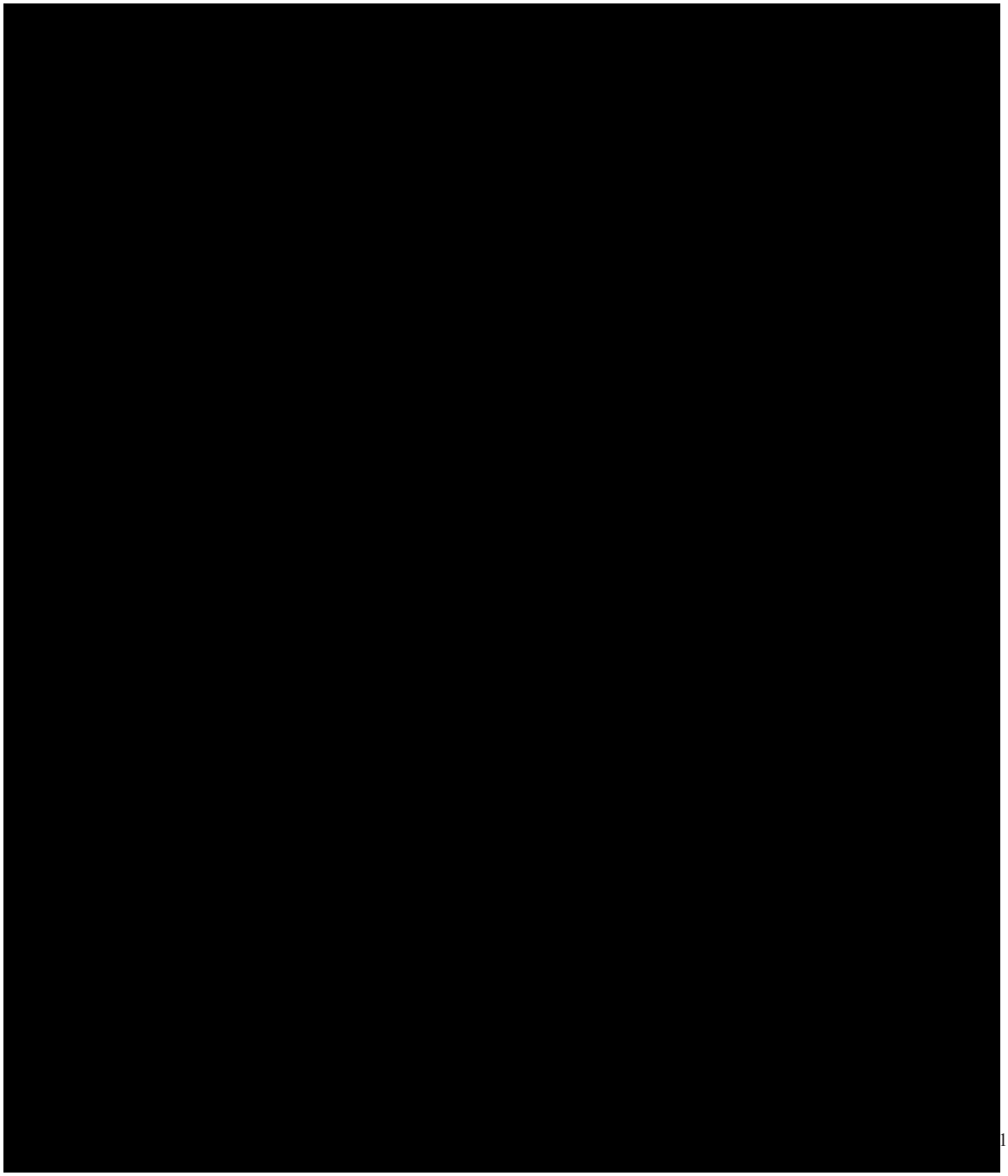
> [I]n the court's ruling on the M.R.E. 404(b) motion, the court noted that this issue of notice had come up during the hearing back in December on the *M.R.E. 404(b) motion*, the continuation was granted to enable the defense to prepare for additional images that will be offered *in support of the charges* in addition to those that were originally noticed during the Article 32 hearing.[176]

To Civilian Defense Counsel, the Military Judge might have been saying that he ruled to admit certain evidence under M.R.E. 404(b) over defense's 404(b) objections in support of the charges in addition to the evidence that was noticed at the Article 32 hearing. That is what M.R.E. 404(b) evidence is – it supports the existing evidence and charges while protecting the accused from improper propensity purposes. Civilian Defense Counsel may have disagreed with the ruling, but there was nothing else to object to at this stage.

The following day during another recap of R.C.M. 802 sessions, the Military Judge mentioned the Findings Worksheet and again brought up *United States v. Dow*,[177] citing his email in App. Ex. 47. The Military Judge asked, "[i]s there a meeting of the minds between defense and trial counsel on what images trial counsel will offer to the members, that they believe constitute child pornography?"[178] Civilian Defense Counsel replied, saying "we have reviewed the 11 identified images. We have no issues with those. And we are tracking after comparing them."[179] This discussion is not a waiver of a *de facto* amendment to the Charge Sheet at this late stage or of the Government's proposed use of this evidence. Civilian Defense Counsel previously objected and was told the Military Judge already ruled on that issue against him. As discussed above, the Military Judge misunderstood Civilian Defense Counsel's email and objection at the MRE 404(b) motions hearing. Civilian Defense Counsel preserved the issue, then had to deal with the Military

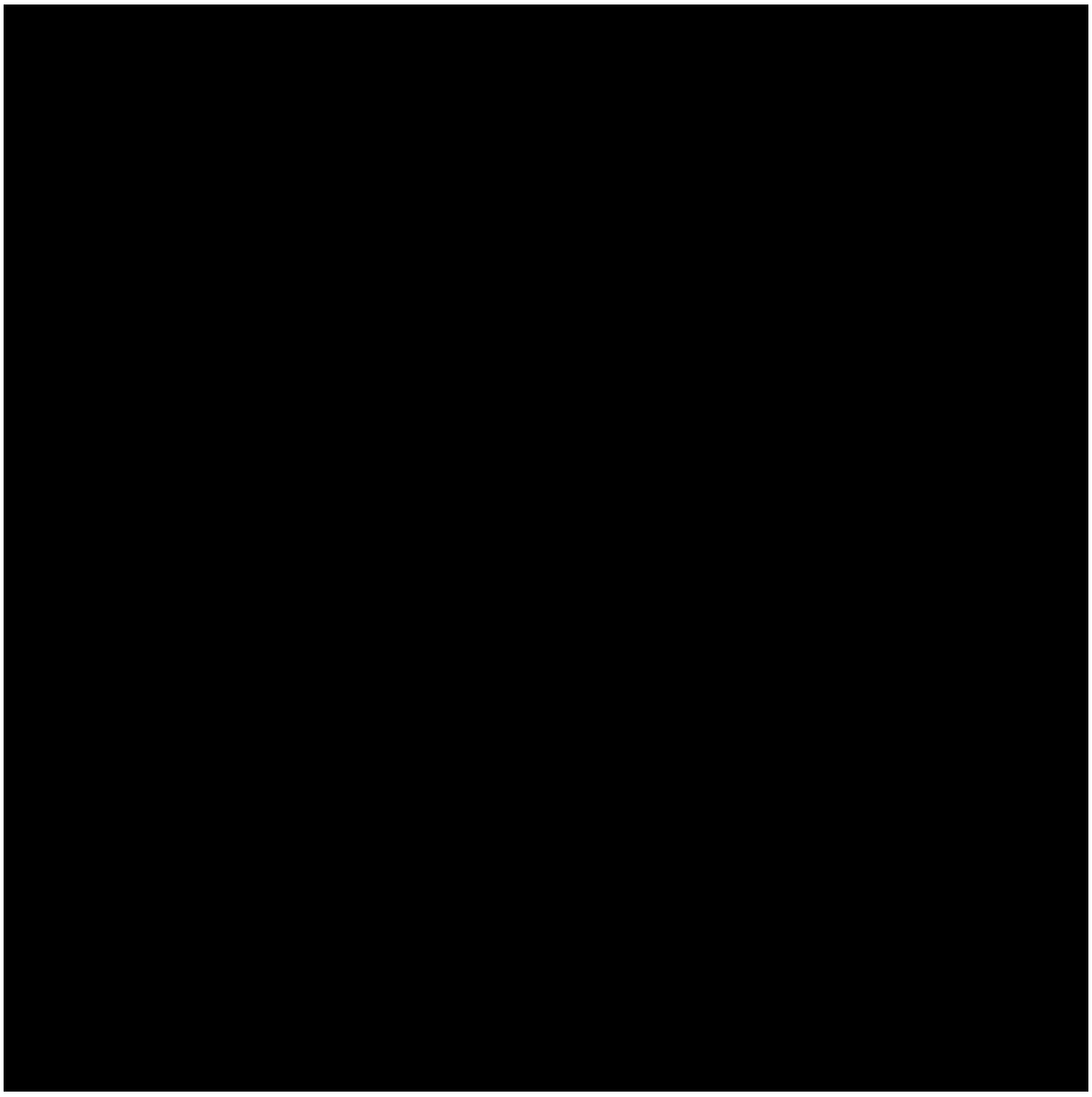
[176] R. at 21 (emphasis added) (Art. 39(a) session of 15 May 2023).
[177] *United States v. Dow*, No. ARMY 20200462, 2022 WL 2161607, at *2 (A. Ct. Crim. App. June 14, 2022).
[178] R. at 470 (Art. 39(a) session of 16 May 2023, recapping prior R.C.M. 802 conferences).
[179] R. at 470 (Art. 39(a) session of 16 May 2023, recapping prior R.C.M. 802 conferences).

Judge's erroneous ruling. He is not required to continue objecting over the ruling, and he continued to walk through the trial process. At that point, Civilian Defense Counsel is merely discussing "some details on format" [180] for what the members will see, in coordination with Trial Counsel.



[181]

[180] R. at 470 (Art. 39(a) session of 16 May 2023, recapping prior R.C.M. 802 conferences).
[181] R. at 471 (Art. 39(a) session of 16 May 2023, recapping prior R.C.M. 802 conferences).

 [82]

Significantly, when the evidence is later presented at trial, Civilian Defense Counsel requested an M.R.E 404(b) instruction.[183] Trial Counsel responded, saying the Military Judge ruled those images "were part of *res gestae* as well as it – defense counsel conceded that those images are…" and then the Military Judge excused the members to discuss the issue outside their

[182] R. at 472 (Art. 39(a) session of 16 May 2023, recapping prior R.C.M. 802 conferences).
[183] R. at 913 (Art. 39(a) session of 18 May 2023 – Direct exam of CGIS S/A V.). CDC asks the Court to give its MRE 404(b) instruction with regards to PE-12 (CD-4, sealed, contains "Image 720d") and PE-13 (CD-5, sealed).

presence.[184] The Military Judge stated, "Defense conceded that images found on the phone are *res gestae* other than those being offered." Civilian Defense Counsel replied, "well, then if we're making [an objection under M.R.E.] 404(b), Your Honor, here's the 403 objection from the defense…"[185] The Military Judge was restating his prior M.R.E 404(b) ruling. Civilian Defense Counsel was again not required to continue objecting following the Military Judge's recapitulation of his ruling. Furthermore, *res gestae* does not permit the Government to add images to the Specification. It is an evidentiary principle which may permit the evidence to be admitted to give context and help prove the charged offenses, but not add new ones.

Before deliberations, the Military Judge instructed the members on the Findings Worksheet to select "guilty" to Specification 1 if the members find Appellant guilty of possessing "eight *or more* images."[186] Appellant was only ever charged with eight images, and the Charge Sheet was never amended. Not only is the Government providing a menu of eleven images to prove eight, but the Military Judge erroneously instructed the members that they could find Appellant guilty of possessing more than eight images. Although he was not convicted of more than eight, this evinces the Court and Government's erroneous belief that they had *de facto* amended the charge sheet again. The first *de facto* change was arguably after the Article 32 preliminary hearing to identify the eight images, as no Bill of Particulars was issued. The Court now believes the second *de facto* amendment now reflected eleven images (including 4 new images post-referral), without the other due process to which Appellant was entitled, including proper preferral, referral, Article 32, and Article 34 advice to the Convening Authority.

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[184] R. at 914 (Art. 39(a) session of 18 May 2023); see also, App. Ex. 105 (Findings Worksheet – also stating "eight *or more* images").
[185] R. at 916 (Art. 39(a) session of 18 May 2023).
[186] R. at 121 (Art. 39(a) of 21 May 2023); *see also*, App. Ex. 101 (Instructions on Findings Worksheet).

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~~OPTION II. Findings of Guilty to one or more offenses~~[1]

~~Of Specification 1 of The Charge:~~	~~Not Guilty~~	~~Guilty~~ ~~(*If finding guilty of possessing EIGHT or more images*)~~
~~OR~~		
Of Specification 1 of The Charge:	Guilty, except the word "eight," Of the excepted word: Not Guilty. ~~(*If finding guilty of possessing less than EIGHT images*)~~	

188

Conclusion

This Court should follow R.C.M. 603, and the two-prong analysis in *Ballan* to conclude that the additional images resulting in convictions were not properly referred to this court-martial. However, because these offenses were never referred to this Court-Martial, under *Reese,* the Court should not conduct a prejudice analysis because the lower Court lacked jurisdiction over these offenses. Therefore, this Court must set aside the findings of guilt in this matter.

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[187] R. at 121 (Art. 39(a) of 21 May 2023); *see also*, App. Ex. 101 (Instructions on Findings Worksheet).
[188] App. Ex. 105 at 1.

IV.

THE MEMBERS' FINDINGS CONSTITUTED A FATAL VARIANCE OF SPECIFICATION 1.

Standard of Review

Material variance is reviewed *de novo* when the issue has been preserved.[189]

Law and Analysis

"From the earliest days of [the CAAF], we have held that to prevail on a fatal variance claim, an appellant must show both that the variance was material and that he was substantially prejudiced thereby."[190] Likewise, the CAAF has stated, "[a] variance that is 'material' is one that, for instance, substantially changes the nature of the offense, increases the seriousness of the offense, or increases the punishment of the offense."[191] Further, "[a] variance can prejudice an appellant by (1) putting 'him at risk of another prosecution for the same conduct,' (2) misleading him 'to the extent that he has been unable adequately to prepare for trial,' or (3) denying him 'the opportunity to defend against the charge'" [emphasis added].[192]

A. There is a variance between Specification 1 of the Charge, and the member's findings.

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[189] *United States v. Marshall*, 67 M.J. 418, 419 (C.A.A.F. 2009), *aff'd,* (C.A.A.F. Jan. 15, 2010); *see also*, *United States v. Finch*, 64 M.J. 118, 121 (C.A.A.F. 2006) (applying a plain error standard when there is a waiver).
[190] *United States v. Marshall*, 67 M.J. 418, 420 (C.A.A.F. 2009), *aff'd*, (C.A.A.F. Jan. 15, 2010) (citing *United States v. Finch,* 64 M.J. 118, 121 (C.A.A.F.2006); *United States v. Hunt,* 37 M.J. 344, 347 (C.M.A.1993); *United States v. Lee,* 1 M.J. 15, 16 (C.M.A.1975); *United States v. Hopf,* 1 C.M.A. 584, 586–87, 5 C.M.R. 12, 14–15 (1952)).
[191] *Id*. (citing *Finch,* 64 M.J. at 121; *see also*, *United States v. Teffeau,* 58 M.J. 62, 66 (C.A.A.F.2003)).
[192] *Id*. (citing *Teffeau,* 58 M.J. at 67).

Appellant was convicted of Specification 1 of the Charge for possessing two images of child pornography, "Hebes.pdf," and "Image 720d."[193] Although these images[194] ultimately appeared on the Findings Worksheet,[195] they were not identified in the Specification, nor were they part of the original eight noticed images that served as the basis for the specification.[196]

As noted above, only seven of the original eight noticed images were included on the Findings Worksheet.[197] Four images were added,[198] totaling eleven named images on the Findings Worksheet, even though only eight were charged.[199]

There is discussion in the record during the Art. 39(a) oral argument session litigating Civilian Defense Counsel's MRE 404(b) motion regarding these additional images, and in general surrounding the Government's evolving position with respect to these images.[200] Nonetheless, how these images went from being anticipated MRE 404(b) material to something on the Findings Worksheet for which Appellant could be (and ultimately was) convicted, is still puzzling. The

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[193] Convening Authority's Action and Entry of Judgment at 3; App. Ex. 105 at 3 (Findings Worksheet).
[194] The "Hebes.pdf" is actually a file, not a single image as Civilian Defense Counsel noted.
[195] App. Ex. 105 at 3.
[196] Art. 32 Report at 1; Audio Recording of Art. 32 Preliminary Hearing at timestamp 26:14-26:35 (emphasis added).
[197] These included: Image 331, Image 758, Image 842, Image 4283, Image 4302, Image 7747, and Image 1593. These images constituted items 4, 5, 6, 8, 9, 10, and 11 on the Findings Worksheet (App. Ex. 105 at 3). The Record is unclear as to why eight were charged, but only seven of those were listed on the Findings Worksheet.
[198] These included: Hebes.pdf (convicted), Image 720d (convicted), Image 85d5, and Image 296. These images constituted items 1, 2, 3, and 7 on the Findings Worksheet (App. Ex. 105 at 3).
[199] Charge Sheet. As noted elsewhere in this brief, the "Hebes.pdf" contained at least eight possible images of child pornography. Those eight, plus the other added three equals eleven additional, uncharged images that went to the members for their determination on findings, in addition to the seven remaining charged images, totaling eighteen images on which the members were permitted to make findings.
[200] *See, e.g.*, R. at 43-49 (Art. 39(a) of 20 December 2022 – Oral Argument on Trial Defense Counsel's motion to exclude M.R.E. 404(b) evidence); App. Ex. XIV – XIX (Def. Motion to Exclude MRE 404(b), Gov. responses, and Military Judge's Ruling).

charges were never withdrawn, amended, re-preferred, referred anew, or sent to Article 32 hearing. There was no second Preliminary Hearing Officer opinion as to probable cause, and consequently no Article 34 advice to the Convening Authority for the four additional offenses. These facts present significant due process and related concerns addressed in other assignments of error. Apart from those issues, there is also a variance between what Appellant was initially noticed and charged with,[201] and what he was ultimately convicted of.[202]

B. This variance is material because these images alleged additional ***offenses*** that were never charged or referred anew to this Court-Martial, which substantially changed the nature of the offense, and increased the seriousness of the offense.

As noted above, the members went from considering eight images based on the specification to eighteen when asked to make their findings. The eight additional images embedded in the Hebes PDF collage alone depicted the most egregious forms of child exploitation – these were the worst images, and the most prejudicial to Appellant. Civilian Defense Counsel said on closing argument in reference to the Hebes PDF, "it is disgusting. It is the only obvious child pornography in this case. It's got like little kids, and its bad."[203]

Indeed, the images in the Hebes PDF are shocking. It appears to depict small children (under age 10) engaging in sexual acts with adults and other children. This is far more prejudicial than the charged images, which among them include a strange series of pictures depicting a topless

[201] Charge Sheet; Art. 32 Report at 1; Audio Recording of Art. 32 Preliminary Hearing at timestamp 26:14-26:35 (emphasis added).
[202] R. at 150 (Art. 39(a) of 20 Dec 22 – announcement of findings (second time); App. Ex. 105 (Findings Worksheet); Entry of Judgment at 3.
[203] R. at 74 (Art. 39(a) of 21 May 2023).

[redacted]-year-old on a motorbike, or the images of post-pubescent teens or young adults that are questionably legal, such as Image 852d and 720d.[204]

The charged images largely fell into the wheelhouse of the questionably legal and criminally strange, while the Hebes PDF fell squarely into the worst possible category of child sexual abuse material. These additional offenses increased the seriousness of the offense by far. They also changed the nature of the offense – not in terms of the charged Article (both were Article 134 – child pornography), but the nature of the preparation required to defend against this type of material.

C. The additional offenses misled Appellant and his Trial Defense team to the extent that he was unable to adequately prepare for trial, and was denied the opportunity to defend against the charge.

Leading up to trial, it was unclear how these additional images were going to be used by the Government.[205] Even during trial, Appellant's trial defense team thought that the additional images would be used either as MRE 404(b) evidence, or as *res gestae* to prove the elements of the charged offenses.[206] Neither the Military Judge nor the Government ever put the defense on notice that they intended to modify the Charge, properly under R.C.M. 603, or *de facto*. Had the

[204] R. at 78 (Art. 39(a) of 19 May 2023) (Cross Examination of Dr. [redacted] (The Government's medical expert admitted that, based on Image 720d alone, he is not comfortable identifying the individual in that image as a minor); *see also*, R. at 923 (Art. 39(a) of 18 May 2023) (Where on cross examination, Special Agent [redacted] described the woman in "Image 720d" as "possibly minor" in terms of her age); App. Ex. 110 at 14 (Def. Post-Trial Motion for Appropriate Relief).
[205] R. at 127-128 (Art. 39(a) of 20 December 2022) ("but I guess that's an area where even the defense is confused at this point, as to how this evidence is going to appear at trial.").
[206] R. at 913 (Art. 39(a) session of 18 May 2023 – Direct exam of CGIS S/A V.). CDC asks the Court to give its MRE 404(b) instruction with regards to PE-12 (CD-4, sealed, contains "Image 720d") and PE-13 (CD-5, sealed). If Civilian Defense Counsel understood that Image 720d was part of an amended charge, or the charge itself, he would have had no reason to request an MRE 404(b) limiting instruction.

defense been on notice as to an amended Charge Sheet, he would have understood the purpose for which these images were being offered, and might have changed defense tactics or preparation.

The defense tactics in defending an accused that merely wanted to access young adult (but legal) pornography, versus one who seeks out the worst possible form of CSAM are fundamentally different. You are either presenting the client as a hapless wanderer of the internet, or maybe as someone who has struggled with mental health and addiction in various forms over the years, including his addiction to illicit pornography.

Just because Civilian Defense Counsel asked for and ultimately received additional time does not mean Appellant was permitted to defend against the additional offenses at trial. There is the technical side to defense preparation – meeting with expert witnesses, reviewing evidence, preparing an opening and closing, etc. More time for technical preparation can remedy some issues. Then there is the strategic side of defense preparation. The bulk of Civilian Defense Counsel's pre-trial preparation and defense theory centered on this evidence being used as MRE 404(b) evidence, or as evidence to prove the mens rea or other *elements of the eight charged images,* not as new charged offenses.[207]

When the Government or Military Judge moves the goal posts, every motion, every request, every action that has already taken place could suddenly have been counter-productive to the new defense theory that becomes necessary in light of the Government's evolving charges. This is why major changes are not permitted after referral.[208] Arraignment and entry of pleas soon follows referral, and an accused may wish to negotiate, litigate, or plead differently at those stages if the charges are different.

[207] App. Ex. XIV (Def. Motion to Exclude MRE 404(b) of 28 Sep 22); App. Ex. XVI.
[208] Rule for Courts-Martial 603, Manual for Courts-Martial (2024 ed.).

Marshall identifies three ways in which an Appellant "*can"* show prejudice, implying that this three-prong approach is not dispositive.[209] The material variance was also prejudicial because it violated due process. Appellant's denial of due process is addressed in Issue II. Furthermore, the variance was prejudicial because it resulted from offenses were never referred. As such, the trial Court's lack of jurisdiction is discussed in Issue III. Prejudice analysis under *Marshall* for fatal variance also considers the Defense's strategy,[210] discussed in Issue VI.

Conclusion

The members' findings of guilt in Specification 1 constitute a fatal variance from the Charge Sheet because Appellant was never charged with knowingly and wrongfully possessing "Hebes.pdf" or "Image 720d." As such the findings must be set aside with prejudice.

V.

THE MILITARY JUDGE ERRONEOUSLY FAILED TO CONDUCT A PROPER INQUIRY INTO THE PANEL MEMBERS' QUESTIONS (CLARIFYING THAT THEY ACQUITTED AFTER THEIR INITIAL VOTE ON BOTH SPECIFICATIONS), AND IMPROPERLY INSTRUCTED THE MEMBERS REGARDING VOTING PROCEDURES.

Standard of Review

The question of whether the panel was properly instructed is a question of law, and thus, review is *de novo*.[211]

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[209] *Marshall*, 67 M.J. at 420.
[210] *United States v. Treat*, 73 M.J. 331 (C.A.A.F. 2014).
[211] *United States v. Williams*, No. 202100006, 2022 WL 1565320, at *4 (N-M. Ct. Crim. App. May 18, 2022), *review denied*, 83 M.J. 103 (C.A.A.F. 2022), citing *United States v. McDonald*, 57 M.J. 18, 20 (C.A.A.F. 2002); *see also*, *United States v. Garner*, 71 M.J. 430, 432 (C.A.A.F. 2013) (citing *United States v. Ober,* 66 M.J. 393, 405 (C.A.A.F.2008)); *United States v. Smith*, 68 M.J. 316, 319 (C.A.A.F. 2010); *United States v. Wolford*, 62 M.J. 418, 422 (C.A.A.F. 2006).

Law and Analysis

The Military Judge has an independent duty to determine and deliver appropriate instructions.[212] In regard to form, a military judge has wide discretion in choosing the instructions to give but has a duty to provide an accurate, complete, and intelligible statement of the law.[213] Failure to provide correct and complete instructions to the panel before deliberations begin may amount to a denial of due process.[214] Furthermore, it is the responsibility of military judges to ensure that any ambiguities in findings are clarified before the findings are announced, and if they fail to do so, the appellate courts cannot rectify that error.[215]

Here, the Military Judge erroneously re-instructed the panel on standard voting procedures, after they stated they informed the Court that they had "voted on both specs. but we don't have ¾ majority on any individual files."[216] This question informed the Court that a vote had taken place, and the results of that vote – a full acquittal. But because the members "weren't clear on how to come to consensus on each file (page 3 of 3). or if that is required," the Military Judge later found that there was "significant ambiguity about the nature of the question and where in the deliberative process the members were at the time of the question."[217]

> At that point [of ambiguity], the military judge should have confirmed with the panel president whether the panel formally voted on each of the three specifications of [the Charge]. Doing so could have been accomplished without disclosing the results of the vote on each specification and would also have provided complete

[212] *United States v. Westmoreland*, 31 M.J. 160, 163-64 (C.M.A. 1990); *United States v. Garner*, 71 M.J. 430 (C.A.A.F. 2013); *United States v. Barnett*, 71 M.J. 248 (C.A.A.F. 2012).
[213] *United States v. Behenna*, 71 M.J. 228 (C.A.A.F. 2012).
[214] *United States v. Wolford*, 62 M.J. 418, 419 (C.A.A.F. 2006), citing, *United States v. Jackson,* 6 M.J. 116, 117 (C.M.A.1979).
[215] *United States v. Augspurger*, 61 M.J. 189 (C.A.A.F. 2005).
[216] App. Ex. 107 (Member Statement indicating they voted).
[217] App. Ex. 119 at 7 (Amended Ruling on Def. Post-Trial Motion for Appropriate Relief).

> information to the military judge, and the parties, in determining how to further instruct the panel.[218]

As the Army Court of Criminal Appeals stated in *Reyes-Lesmes*, it was the Military Judge's job to clear up any ambiguity, which he failed to do.[219]

> Prior to the announcement of findings in open court, "[t]he military judge may, in the presence of the parties, examine any writing which the president intends to read to announce the findings and may assist the members in putting the findings in proper form." R.C.M. 921(d). Our superior court has made it clear that it is the responsibility of the military judge to ensure that any ambiguities or deficiencies in a court-martial's findings "are clarified before the findings are announced." *United States v. Augspurger*, 61 M.J. 189, 193 (C.A.A.F. 2005). This can be accomplished by "ask[ing] the members to clarify their findings" prior to the announcement. *Id.* at 192. A military judge's failure to clarify ambiguous or defective findings may result in error that cannot be rectified by an appellate court. *(citations omitted).*[220]

Nonetheless, the panel President himself tried to clear up the confusion, but when he attempted to ask the Military Judge a question, the Military Judge refused to let him ask.[221] The Military Judge erroneously failed to clear up what he believed was a significant ambiguity before providing further instructions to the members.

Without the benefit of first clarifying any ambiguity, the Military Judge then sought to instruct the members. Civilian Defense Counsel stated he "would not object" with the Military Judge's proposed re-instruction on standard voting procedures, which they had previously received.[222] However, he also said moments before, "I do agree with the Court that they have

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[218] *United States v. Reyes-Lesmes*, No. ARMY 20180396, 2020 WL 6533831, at *5 (A. Ct. Crim. App. Nov. 4, 2020).
[219] App. Ex. 119 at 5 (Amended Ruling on Def. Post-Trial Motion for Appropriate Relief). The Military Judge based this decision on authorities such as R.C.M. 923, M.R.E 606(b), and *United States v. Loving,* 41 M.J. 213, 235-239 (C.A.A.F. 1994), stating that inquiry into the members' deliberative process is normally prohibited.
[220] *United States v. Reyes-Lesmes*, No. ARMY 20180396, 2020 WL 6533831, at *5 (A. Ct. Crim. App. Nov. 4, 2020).
[221] R. at 143.
[222] R. at 141 (Art. 39(a) of 21 May 2023).

indicated they've already voted, so we can't simply have them go back and say--a normal clarification will not resolve this."[223] He also discussed an unspecified CAAF case saying the "Military Judge may take steps to correct an issue like this through entry of a finding of not guilty." Thus, any waiver of this instruction was predicated on his belief that the Military Judge's instruction would lead the members to effectuate the vote that they already informed the Court they had taken – their vote to acquit.

Furthermore, when the members did not return a verdict equivalent to their prior vote to acquit, the Military Judge erroneously failed to clarify the ambiguity, and re-instruct the members on reconsideration procedures. The Defense did not waive any error for this failure to properly instruct, as discussed in Issue VI. The Defense did not waive any error for this failure to properly instruct, as he made an oral, then written, motion for appropriate relief asking the Court to set aside the findings of guilty.[224] During his oral motion, Civilian Defense Counsel stated,

> And that despite the judge's instructions and contrary to the judge's instructions, they essentially re-voted, which was not your instruction to do. Their note says they have voted. And it says that they have reached a result. And they've gone back and voted again.[225]

While there is an affirmative statement by Civilian Defense Counsel regarding the first of these two instructions,[226] that statement was predicated on a belief that implementation of the vote to acquit would follow the instruction. In the same breath, the Military Judge found that "neither party objected to the proposed instructions," while also finding that he "did not specifically rule on the Defense's proposed way ahead."[227] The Military Judge directly acknowledged that Civilian

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[223] R. at 140.
[224] App. Ex. 110 (Def. Post-Trial Motion for Appropriate Relief); R. at 152 (Art. 39(a) of 21 May 2023).
[225] R. at 152-153 (Art. 39(a) of 21 May 2023).
[226] R. at 141 (Art. 39(a) of 21 May 2023).
[227] App. Ex. 119 at 4 (Amended Ruling on Def. Motion for Appropriate Relief).

Defense Counsel proposed a different course of action which he did not rule on. That is an acknowledgment by the Military Judge that Civilian Defense Counsel did not waive this issue. These findings conflict, and are clearly erroneous. These erroneous findings tainted the Military Judge's conclusions of law because his analysis of a reconsideration vote is based in part on his earlier erroneous instruction on standard voting procedures, for which he admittedly "did not rule on the Defense's way ahead."[228] Therefore, this Court should disregard any waiver of this instruction, and review both instructions *de novo*.[229]

The Military Judge's ruling found that he "reread the instruction concerning the reconsideration *procedure*"[230] which appear to be drafted from the Procedural Instructions on Findings (2-5-14) from the Military Judges' Benchbook.[231] However, the Military Judge did not find nor did he provide the Reconsideration Instruction on Findings (2-7-14)[232] to the members, or state that they ever asked for reconsideration instructions. The Reconsideration Instruction incorporates the requirements of Rule for Courts-Martial 924 and Article 52, UCMJ, which provide specific procedures for when and how reconsideration may be conducted.

The Military Judge discussed his intended instruction with Trial and Defense Counsel:[233]

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[228] App. Ex. 119 at 4 (Amended Ruling on Def. Motion for Appropriate Relief).
[229] *United States v. Wolford*, 62 M.J. 418, 420 (C.A.A.F. 2006), citing, *United States v. Smith,* 50 M.J. 451, 455–56 (C.A.A.F.1999), and *United States v. Mundy,* 2 C.M.A. 500, 502 (1953).
[230] App. Ex. 119 at 4 (finding 20) (emphasis added).
[231] Military Judges' Benchbook, www.jagcnet.army.mil/EBB/
[232] Military Judges' Benchbook, www.jagcnet.army.mil/EBB/.
[233] R. at 141 (Ar.t 39(a) of 21 May 2022).

Prior to the Military Judge reading his proposed instruction, Trial Defense Counsel consistently objected to the idea of re-instructing the Members, as they had already announced their vote.[234] The Military Judge twice re-instructed the Members on standard voting procedures. This instruction included guidance on reconsideration, which required the Members to open the Court and announce reconsideration, and to seek further guidance from the Military Judge should they chose to reconsider their vote.[235]

[234] R. at 137-140.
[235] R. at 143.

The panel President indicated that something was unclear to him, but the Military Judge did not permit him to ask the question.[236] The Military Judge sent the Members back for further deliberation, after which the Members came back with an incomplete findings worksheet, and the Military Judge then had to further instruct the President on how to complete the form.[237] After that, the Members returned and had again voted, this time resulting in a conviction for Specification 1.[238] At no point did the Members open the Court to ask to reconsider their original vote or for further instructions on reconsideration.[239]

A. The Military Judge's erroneous instructions were not harmless beyond a reasonable doubt.

"If instructional error is found, because there are constitutional dimensions at play, [Appellant's] claims 'must be tested for prejudice under the standard of harmless beyond a reasonable doubt.'"[240] "The inquiry for determining whether constitutional error is harmless beyond a reasonable doubt is 'whether, *beyond a reasonable doubt*, the error did not *contribute to* the defendant's conviction or sentence.'"[241]

These instructional errors absolutely contributed to, if not directly caused, Appellant's convictions. If the Military Judge had clarified the panel President's question before initially re-instructing the Members, he could have confirmed whether or not the members acquitted, had questions about voting, reconsideration, filling out the Findings Worksheet, or otherwise. He refused to answer the panel President's question[242] at the crucial juncture after they "voted on both

[236] R. at 143.
[237] R. at 148.
[238] R. at 150.
[239] R. at 142-151.
[240] *United States v. Wolford*, 62 M.J. 418, 420 (C.A.A.F. 2006), citing *United States v. Kreutzer,* 61 M.J. 293, 298 (C.A.A.F.2005).
[241] *Id.* (quoting *United States v. Kaiser,* 58 M.J. 146, 149 (C.A.A.F.2003) (emphasis added)).
[242] R. at 143.

specs. but [stated] we don't have ¾ majority on any individual files."[243] Then he failed to ask clarifying questions himself after the second vote was clearly contrary to the first. Then he failed to re-instruct the members on reconsideration, if responses to the clarifying questions he failed to ask would have necessitated that.

Conclusion

This Court should set aside the findings with prejudice because the Military Judge's erroneous instructions were not harmless beyond a reasonable doubt.

VI.

APPELLANT RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS COUNSEL FAILED TO CLEARLY ASSERT AND MAINTAIN OBJECTIONS TO THE MILITARY JUDGE'S ERRONEOUS INSTRUCTIONS TO THE PANEL, AND TO THE MILITARY JUDGE ALLOWING ADDITIONAL OFFENSES TO BE CONSIDERED AS PART OF SPECIFICATION 1.

Standard of Review

"In reviewing for ineffectiveness, th[is] Court looks at questions of deficient performance and prejudice de novo."[244]

Law and Analysis

The CAAF recently had occasion to again consider the law as it pertains to ineffective assistance of counsel. In *United States v. Metz,*[245] the CAAF outlined the law as follows:

> The Supreme Court has distinguished two components essential for establishing ineffectiveness of counsel. First, an appellant must show that counsel's performance was deficient. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). "This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment."

[243] App. Ex. 107 (Member Statement indicating they voted).
[244] *United States v. Datavs*, 71 M.J. 420, 424 (C.A.A.F. 2012) (internal quotation marks omitted) (quoting *United States v. Gutierrez*, 66 M.J. 329, 330-31 (C.A.A.F. 2008)).
[245] *United States v. Metz*, __ M.J. __ , Crim. App. No. 201900089 (C.A.A.F., June 20, 2024).

> *Id.* Second, an appellant must show that counsel's deficient performance resulted in prejudice. *Id.* "This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.* An appellant must prove that defense counsel's performance "fell below an objective standard of reasonableness." *Id.* at 688. "In any case presenting an ineffectiveness claim, the performance inquiry must be whether counsel's assistance was reasonable considering all the circum-stances." *Id*. Scrutiny of counsel's performance should be highly deferential. *Id*. at 689. The court must assess "the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." *Id*. at 690…if deficient performance is established, to demonstrate prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694.

However, Courts of appeal cannot review waived issues absent ineffective assistance of counsel.[246]

> Waiver is the 'intentional relinquishment or abandonment of a known right.' 'Whether a particular right is waivable; whether the defendant must participate personally in the waiver; whether certain procedures are required for waiver; and whether the defendant's choice must be particularly informed or voluntary, all depend on the right at stake.'[247]

"[A] waiver is a *deliberate decision* not to present a ground for relief that might be available in the law."[248] "[T]here is a presumption against the waiver of constitutional rights, and for a waiver to be effective it must be clearly established that there was an *intentional relinquishment or abandonment of a known right or privilege*" [emphasis added].[249]

Appellant's claim of ineffective assistance of counsel can be broadly characterized as his counsel's failure to ensure he received due process throughout his court-martial. The lack of due

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[246] *United States v. Day*, 83 M.J. 53 (C.A.A.F. 2022); *see also United States v. Blackburn*, 80 M.J. 205 (C.A.A.F. 2020); *United States v. Rich*, 79 M.J. 472 (C.A.A.F 2020); *United States v. Davis*, 79 M.J. 329 (C.A.A.F. 2020).
[247] *United States v. Girouard*, 70 M.J. 5, 10 (C.A.A.F. 2011) (citing *United States v. Harcrow*, 66 M.J. 154, 156 (C.A.A.F.2008)); *United States v. Olano,* 507 U.S. 725 (1993).
[248] *United States v. Campos*, 67 M.J. 330 (C.A.A.F. 2009); *see United States v. Gladue*, 67 M.J. 311, 313 (C.A.A.F. 2009), for a discussion of the difference between waived and forfeited issues.
[249] *Id*. (citing *Harcrow,* 66 M.J. at 157).

process that Appellant received is directly addressed in Issue II. Two examples of Trial Defense Counsel's conduct that fall into this broader category are discussed below. However,

> A judge is ultimately responsible for the control of his or her court and the trial proceedings (citations omitted). Proper case management during a trial, necessary for the protection of an accused's due process rights and the effective administration of justice, is encompassed within that responsibility. [250]

Nonetheless, Appellant asserts this assignment of error.

A. Trial Defense Counsel were ineffective when they failed to maintain objections to the Military Judge's erroneous instructions on voting procedures after the panel voted to acquit.

Civilian Defense Counsel did not waive any error for the Military Judge's failure to properly instruct the members after they initially voted to acquit.[251] The Defense made an oral, then written, post-trial motion for appropriate relief asking the Court to set aside the findings of guilty based on acquittal.[252]

After receiving the note, the Military Judge proposed re-instructing the members on the standard voting procedures, to include a reminder to request reconsideration instructions if the members wished to reconsider. The Defense said they "would not object to that, Your Honor."[253] At first blush, this appears to be a waiver of error for this particular instruction. However, when read in context of the preceding pages of the transcript, the Defense's statement was predicated on a belief that the instruction was simply an administrative step to implement the findings the

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[250] *United States v. Vargas*, 74 M.J. 1, 8 (C.A.A.F. 2014) (citing *Taylor v. Kentucky,* 436 U.S. 478, 489 n. 17, 98 S.Ct. 1930, 56 L.Ed.2d 468 (1978) ("'The trial judge has the responsibility for safeguarding both the rights of the accused and the interests of the public in the administration of criminal justice'" (citations omitted)); Rule for Courts-Martial 801 ((a)(3), Manual for Courts-Martial (2024).
[251] App. Ex. 107 (Member Statement indicating they voted).
[252] App. Ex. 110 (Def. Post-Trial Motion for Appropriate Relief); R. at 152 (Art. 39(a) of 21 May 2023).
[253] R. at 141-153 (Art. 39(a) of 21 May 2023).

members already reached by vote – to acquit. Immediately after the members returned with a second vote to convict, without having received reconsideration instructions, the Defense immediately moved the Court to set aside those second findings.

This issue is preserved, but if the Court views the Defense's statement as a waiver of error for this instruction, such a waiver constituted ineffective assistance of counsel. Whether the members voted to acquit or convict and how they were instructed to do so is the very heart of any criminal case. As a direct result of this erroneous instruction, the members returned with the results of a second vote, this time to convict. A waiver at a time like this on an issue like this is would be an abdication of one's role as a defense attorney. But for this instruction, Appellant's initial acquittal may have remained in place. This is the definition of prejudice to Appellant.

B. Trial Defense Counsel were ineffective when they failed to clearly assert and maintain objections to the Military Judge allowing additional offenses to be considered as part of Specification 1.

i. Prejudice analysis under Marshall[254] for Issue IV (Fatal Variance) considers Trial Defense Counsel's strategy. The analysis for fatal variance goes hand-in-hand with that for the de facto major changes to Specification 1.

"[The CAAF] looks closely at the specifics of the defense's trial strategy when determining whether a material variance denied an accused the opportunity to defend against a charge. In so doing, we consider how the defense channeled its efforts and what defense counsel focused on or highlighted."[255]

If this Court takes the view that the Defense waived essentially all of Appellant's due process rights including notice, proper charging, Article 32 and Article 34 procedures, proper referral, and arraignment for each of the four images ostensibly added to the specification post-

[254] *United States v. Marshall*, 67 M.J. 418, 419 (C.A.A.F. 2009), *aff'd,* (C.A.A.F. Jan. 15, 2010).
[255] *United States v. Treat*, 73 M.J. 331, 336 (C.A.A.F. 2014) (*citing*, *Marshall,* 67 M.J. at 421; *Teffeau,* 58 M.J. at 67; *United States v. Lovett,* 59 M.J. 230, 236 (C.A.A.F.2004)).

referral, and without the benefit of a colloquy from the Military Judge, then the only conclusion that can follow is that Appellant received ineffective assistance from his counsel.[256]

Even if the Court finds the Defense did waive some of Appellant's due process rights within accepted defense practice, neither he, the Trial Counsel, nor the Military Judge had the authority to refer the additional offenses of the four images to this court-martial, and the Convening Authority took no such action to refer them. Thus, the offenses that served as the basis for Appellant's conviction were never properly before the Court-Martial, and the Court lacked jurisdiction. See Issue III.

When discussing what images should be listed on the Findings Worksheet, the Military Judge referenced *U.S. v. Dow.*[257] While that case highlighted the need to itemize the images on the Findings Worksheet to ensure this Court had the ability to conduct a proper factual sufficiency review under Art. 66, *Dow* does not support adding new offenses to the Findings Worksheet post-arraignment and referral that were not part of an amended charge under R.C.M. 603, not the subject of an Art. 32 preliminary hearing, and not properly referred to the court-martial. *Dow* served as a valid reason to list each of the *eight* charged and noticed images on the Findings Worksheet only. Any valid Defense strategy ends there.

Dow was not a valid authority for amending a charge de facto post-referral via the Findings Worksheet. To the extent the Military Judge relied on this case for that purpose, it was error, and to the extent the Defense similarly relied on it, their assistance was ineffective in this regard. It is

[256] *See, e.g.*, Rule for Courts-Martial 705(c)(1)(B), Manual for Courts-Martial (2019 ed.).
[257] *United States v. Dow*, No. ARMY 20200462, 2022 WL 2161607, at *1 (A. Ct. Crim. App. June 14, 2022); App. Ex. 47 (Military Judge's email discussing *Dow*); R. at 347 (Art. 39(a) of 16 May 2022) (discussing *Dow*); R. at 979 (Art. 39(a) of 18 May 2022) (Discussing *Dow* – incorrectly transcribed as "*Dile*").

immaterial if the Government noticed its *intent* to add these images to the specification,[258] because they ultimately never amended the Specification.

Civilian Defense Counsel's overly broad reading of *Dow* and flawed reliance on it to permit a *de facto* post-referral major change to Specification 1 resulted in the fatal variance Appellant now claims, and both of these issues resulted in Appellant's only convictions. The Defense's overly-broad reading of Dow undermines any Government argument that this perspective was part of some defense strategy under *Treat*[259] for purposes of variance analysis. If there was a defense strategy, it was fundamentally ineffective in this aspect of the case.

Civilian Defense Counsel noted that in any event, the Government could get a variance instruction.[260] However, this reasoning is flawed as well, because such an instruction would not have permitted the Government to "change the nature or identity of the offense,"[261] which is exactly what happened here.[262] In a sense, the Benchbook variance instruction permits the members to make minor changes to the specification. The standard variance instruction that Civilian Defense Counsel presumably referred to reads:

7–15. VARIANCE–FINDINGS BY EXCEPTIONS AND SUBSTITUTIONS

If you have doubt about the (time) (place) (manner in which the injuries described in the specification were inflicted) (_____), but you are satisfied beyond a reasonable doubt that the offense (or a lesser included offense) was committed (at a time) (at a place) (in a particular manner) (_____) that differs slightly from the exact (time) (place) (manner) (_____) in the specification, you may make minor modifications in reaching your findings by changing the (time) (place) (manner in which the alleged injuries described in the specification were inflicted) (_____) described in the specification, provided that you do not change the nature or identity of the offense (or the lesser included offense).

As to (The) Specification (___) of (The) (Additional) Charge (___), if you have doubt that _____, you may still reach a finding of guilty so long as all the elements of the offense (or a lesser included offense) are proved beyond a reasonable doubt, but you must modify the specification to correctly reflect your findings.

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[258] App. Ex. XV, XVII (Gov. Responses to Def. Motion to Exclude MRE 404(b).
[259] *United States v. Treat*, 73 M.J. 331 (C.A.A.F. 2014).
[260] R. at 153 (Art. 39(a) of 20 December 2022).
[261] See the standard variance instruction from the Military Judges' Benchbook cited below.
[262] See analysis in Issue IV (Fatal variance).
[263] Military Judges' Benchbook, Instruction 7-15. Variance – Findings by Exceptions and Substitutions, https://www.jagcnet.army.mil/EBB/.

This instruction provides guidance on findings by exceptions and substitutions, but as noted, R.C.M. 603 does not permit major changes in most circumstances. Civilian Defense Counsel's belief that such an instruction would inevitably cure this material variance, this major change, was mistaken for purposes of *Treat* analysis, and ineffective. The Military Judge's instructions on findings incorporated some aspects of the standard variance instruction, but again, these instructions were deficient for the same reason that they did not and could not authorize a *de facto* major change to Specification 1, or cure the fatal variance that followed.[264]

Conclusion

Appellant received ineffective assistance of counsel at trial because his Counsel failed to ensure Appellant received due process throughout the proceedings, failed to maintain objections to the Military Judge's erroneous instructions on voting procedures after the panel voted to acquit, and failed to clearly assert and maintain objections to the Military Judge allowing additional offenses to be considered as part of Specification 1. These issues severely prejudiced Appellant. Defense counsel is the last back-stop for due process. The Military Judge surely erred, but Appellant should have been able to rely on his Counsel to effectively defend him on these highly technical and critical issues. Therefore, the convictions must be set aside with prejudice.

[264] R. at 121 (Art. 39(a) of 21 May 2023); *see also*, App. Ex. 101 (Instructions on Findings Worksheet).

VII.

THE EVIDENCE IN SPECIFICATION 1 OF THE CHARGE WAS LEGALLY AND FACTUALLY INSUFFICIENT.

Standard of Review

Whether the evidence in the record is legally sufficient to support a finding of guilty is reviewed *de novo*.[265]

Law and Analysis

The test for legal sufficiency is whether, considering the evidence in the light most favorable to the Government, any rational trier of fact could have found the elements of the crime beyond a reasonable doubt.[266] Courts "draw every reasonable inference from the evidence of record in favor of the prosecution."[267]

For factual sufficiency, courts "weigh the evidence in the record of trial, make allowances for not having observed and heard the witnesses, and then ask whether [it is] independently convinced of Appellant's guilt beyond a reasonable doubt."[268] Courts apply "neither a presumption of innocence or a presumption of guilt."[269]

A. The Elements of Article 134, UCMJ, Possessing Child Pornography.

To sustain Appellant's conviction for wrongfully possessing child pornography, the Government must have proven beyond a reasonable doubt that: (1) Appellant *knowingly and*

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[265] *United States v. Smith*, 68 M.J. 316, 322 (C.A.A.F. 2010).
[266] *Jackson v. Virginia*, 443 U.S. 307, 318-319 (1979); *United States v. Turner*, 25M.J. 324, 325 (C.M.A. 1987); *United States v. Reed*, 51 M.J. 559, 561-62 (N-M. Ct. Crim. App. 1999), *aff'd.* 54 M.J. 37 (C.A.A.F. 2000); *see also* Art. 66, UCMJ.
[267] *United States v. Lyle*, No. 202100100, 2022 WL 4939343, at *2 (N-M. Ct. Crim. App. Oct. 4, 2022), *review denied*, 83 M.J. 306 (C.A.A.F. 2023) (citing *United States v. Gutierrez*, 74 M.J. 61, 65 (C.A.A.F. 2015)).
[268] *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987).
[269] *Lyle*, 2022 WL 4939343, at *2.

wrongfully possessed child pornography, and (2) under the circumstances, the conduct of the accused was of a nature to bring discredit upon the armed forces.[270] Courts consider several factors regarding the wrongfulness element, particularly whether the images were (1) unintentionally or (2) inadvertently acquired.[271] This includes "the method by which the visual depiction was acquired, the length of time the visual depiction was maintained, and whether the visual depiction was promptly, and in good faith, destroyed or reported to law enforcement."[272]

i. Court of Appeals for the Armed Forces Precedent.

In *United States v. Navrestad*, the Court set aside the accused's conviction for possessing child pornography, finding that the evidence of viewing and sending a link containing child pornography to another person was legally insufficient to establish dominion and control.[273] The Court held that knowing possession requires the viewing of the images to be both "knowing and conscious."[274] The accused did not knowingly possess images of child pornography where: (1) he could not access the areas of the computer's hard drive where the images were automatically saved; (2) he could not download the images to a portable storage device; and (3) there was no evidence he had emailed, printed, or purchased copies of the images.[275]

In *United States v. King*, the Court emphasized the importance of circumstantial evidence.[276] In that case, the accused was found guilty of knowingly and wrongfully viewing child pornography based on circumstantial evidence, including the accused's use of search terms[277] and

[270] MCM pt. IV, para. 68.b.(1).
[271] *MCM,* pt. IV, ¶ 68b.c.(9).
[272] *MCM,* pt. IV, ¶ 68b.c.(9).
[273] *United States v. Navrestad*, 66 M.J. 262, 268 (C.A.A.F. 2008).
[274] *Id.* at 267.
[275] *Id.* at 267.
[276] *United States v. King*, 78 M.J. 218 (C.A.A.F. 2019).
[277] *Id*. at 221 ("Skimpy preteen;" "sexy little girls;" and "Loli porn.").

admissions about viewing similar images.[278] The accused admitted to viewing images, being "thrilled" by them, and masturbating to them.[279] Unlike *Navrestad*, where dominion and control over the images were critical, *King's* case focused on the accused's intent and actions leading to the images being cached on his computer.[280]

ii. Service Courts of Criminal Appeals Precedent.

Service courts have required corroborating evidence of knowledge in child pornography cases. In *United States v. Moss*, the court affirmed the conviction where evidence of child pornography was in cache, the accused used search terms associated with child pornography, and he had a partially downloaded video in his downloads folder.[281] In *United States v. Davenport*, the conviction was upheld although the child pornography was in cache because the accused admitted to downloading child pornography, ran search terms such as "pedo," and "Lolita," and shared images via Skype.[282] In *United States v. Lyle*, the conviction was affirmed where evidence of child pornography was in cache, the accused discussed child pornography over Snapchat, and sent images to another person.[283] The court noted that mere presence of images in cache may carry weight if other evidence of knowledge is present, such as search terms and communications.[284]

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[278] *Id*. at 219.
[279] *Id*.
[280] *Id*.
[281] *United States v. Moss*, No. ACM 40249, 2023 WL 2818699 (A.F. Ct. Crim. App. 2023).
[282] *United States v. Davenport*, 2016 CCA LEXIS 729 (A. Ct. Crim. App. 2016).
[283] *United States v. Lyle*, No. 202100100, 2022 WL 4939343 (N-M. Ct. Crim. App. 2022).
[284] *Id.* at 2; *see also United States v. Kamara*, No. NMCCA 201400156, 2015 WL 2438269, (N-M. Ct. Crim. App. May 21, 2015) (Where the court set aside a specification for possession of child pornography, finding no knowing possession where the images were in unallocated space, and there was no evidence the appellant had the tools or knowledge to access them.); *United States v. Schempp*, No. ARMY 20140313, 2016 WL 873852, at *1 (A. Ct. Crim. App. Feb. 26, 2016). (Where the court found the evidence legally insufficient to support a conviction where the files were in unallocated space, and there was no evidence the accused had the tools or knowledge to access them.).

Service courts have found evidence sufficient to establish knowing possession when the Government presents additional evidence demonstrating knowledge, even if the evidence is located in unallocated space or cache. However, to "knowingly" possess child pornography, the possession must be "knowing and conscious."[285]

B. Legal Insufficiency.

The evidence supporting Appellant's conviction for possessing child pornography is legally insufficient because the images or documents for which Appellant was convicted were found in unallocated space or in cache files, which are not readily accessible.

i. Cache files do not demonstrate knowing possession.

The mere presence of files in cache does not establish that the accused knowingly possessed child pornography. In this case, the Government's own expert, Mr. [redacted] admitted uncertainty regarding whether the images were actually viewed by Appellant. The expert could not definitively state if the images were part of an automatically cached webpage or if Appellant interacted with them in any manner that would indicate knowing possession.

Additionally, the images were located in areas of Appellant's phone and hard drive that are not typically accessible without specialized forensic software. In *United States v. Navrestad*, the Court set aside the conviction because the accused could not access the areas of the hard drive where the images were automatically saved. Similarly, in this case, there is no evidence that Appellant had the ability or knowledge to access these files, download them, or distribute them.

ii. Insufficient Corroborating Evidence.

There was no additional evidence presented that Appellant was the user when the images were allegedly accessed. The computer was located in a shared space, accessible by multiple

[285] MCM pt IV, para. 68.b.c.(5).

individuals, and no specific evidence linked Appellant to the actual viewing or intentional download of the images. The timeframe in question spans several months, further complicating the attribution of specific actions to Appellant.

iii. Absence of Intentional Actions.

Unlike in *King*, where the accused admitted to seeking out and being aroused by child pornography, there were no such admissions or actions in Appellant's case. The Government did not provide evidence that Appellant used specific search terms related to child pornography, shared the images, or took steps to preserve or conceal them. The presence of images in unallocated space alone does not indicate knowing and wrongful possession, especially without evidence of Appellant's intent or awareness.

A. Factual Insufficiency.

Weighing the evidence, the Government failed to establish beyond a reasonable doubt that Appellant knowingly and wrongfully possessed the images of child pornography. The images were found in cache and unallocated space, areas where files can be stored without the user's knowledge. The Government's expert could not definitively state that the images were ever displayed on Appellant's screen or that Appellant was even aware of their existence. Unlike cases where knowledge and wrongful intent could be inferred from other independent evidence, such as attempts to delete files or communications about child pornography, there is no such corroborating evidence in this case.

The Government's case relied solely on the presence of files in inaccessible parts of the computer, which is insufficient to establish knowing possession. Even if the images were accessible, the Government did not prove that Appellant's viewing of the images was knowing

and wrongful. There is no evidence that Appellant intentionally sought out or even viewed the images, or that he had any predisposition to view child pornography.

Furthermore, the Government's medical expert admitted that, based on Image 720d alone, he is not comfortable identifying the individual in that image as a minor.[286]

Conclusion

The Government did not meet its burden of proof beyond a reasonable doubt. The evidence is legally and factually insufficient to sustain Appellant's conviction for possessing child pornography under Specification 1 of the sole Charge. The images were stored in inaccessible locations and there was no additional evidence of knowing possession. Therefore, the findings should be reversed and the charge dismissed.

CONCLUSION

Appellant faced offenses at trial which he was never charged with committing. Upon deliberation, he was initially acquitted of The Charge and both Specifications. Then, after additional judicial error, the panel voted again and convicted Appellant of wrongfully possessing two images of child pornography which were never part of the charged misconduct. Simultaneously, Appellant was acquitted of all charged offenses, and of possessing two additional uncharged images.

Appellant was denied due process as a result of the Military Judges' instructional errors and because he permitted a *de facto* amendment to the Charge and Specification 1 post-referral without complying with R.C.M. 603. The Court-Martial lacked jurisdiction because the offenses

[286] R. at 78 (Art. 39(a) of 19 May 2023) (Cross Examination of Dr. [redacted]); *see also*, R. at 923 (Art. 39(a) of 18 May 2023) (Where on cross examination, Special Agent [redacted] described the woman in "Image 720d" as "possibly minor" in terms of her age); App. Ex. 110 at 14 (Def. Post-Trial Motion for Appropriate Relief).

were never referred. Appellant's Counsel was also ineffective to the extent they did not make or maintain appropriate objections to these issues. Lastly, the evidence was factually and legally insufficient because the images were in cache. For these reasons, this Court must set aside Appellant's conviction in Specification 1 with prejudice.

DATE: 23 JULY 2024

Respectfully submitted,

POPE.THADEUS.JACKSON.[redacted] Digitally signed by POPE.THADEUS.JACKSON[redacted] Date: 2024.07.23 16:47:55 -04'00'

Thad Pope
LCDR, USCG
Appellate Defense Counsel
[redacted]

Certificate of Filing and Service

I certify that the foregoing was filed electronically with this Court and that a copy was delivered to opposing counsel via email on 23 July 2024.

POPE.THADEUS.JACKSON[redacted] Digitally signed by POPE.THADEUS.JACKSON[redacted] Date: 2024.07.23 16:48:16 -04'00'

Thad Pope
LCDR, USCG
Appellate Defense Counsel
[redacted]

IN THE UNITED STATES COAST GUARD
COURT OF CRIMINAL APPEALS

UNITED STATES,	25 July 2024
Appellee	**CONSENT MOTION FOR FIRST ENLARGEMENT OF TIME TO FILE ANSWER**
v.	Docket No. 1495 Case No. CGCMG 0396 Before McClelland, Havranek, Brubaker
ERICK R. KELLEY, Electronics Technician Second Class (E-5) U.S. Coast Guard, *Appellant*	Tried at Alameda, CA from 15 to 21 May 2023, before a General Court-Martial convened by Commander, U.S. Coast Guard Pacific Area

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John Nolan
U.S. Coast Guard
Appellate Government Counsel
Commandant (CG-LMJ)
[redacted]

TO THE HONORABLE JUDGES OF THE UNITED STATES COAST GUARD COURT OF CRIMINAL APPEALS

Pursuant to Rule 23.2 of this Court's Rules, the Government hereby respectfully moves for a 30-day enlargement of time in which to file an Answer to Appellant's Assignments of Error. The Answer is currently due on Friday, 2 August 2024. This is the Government's first request for an enlargement of time. Appellant, through counsel, consents to this motion.

The record of trial in this matter required significant time to thoroughly review. Although undersigned counsel has finished review of the record, additional time is needed to complete the necessary research on divergent areas of the law. The additional time will allow the Government to properly address the seven (7) asserted Assignments of Error.

The Government further notes that Appellant recently (23 July 2024) filed a corrected version of his Assignments of Error.

Accordingly, the United States respectfully requests an enlargement of time up to and including Tuesday, 3 September 2024 to file its Answer.

Respectfully submitted,

NOLAN.JOHN.PA[redacted] Digitally signed by NOLAN.JOHN.PAUL.[redacted] Date: 2024.07.25 12:03:09 -04'00'

DATE: 25 July 2024

John Nolan
U.S. Coast Guard
Appellate Government Counsel
Commandant (CG-LMJ)
[redacted]

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was delivered to the Court and opposing counsel via e-mail on 25 July 2024.

NOLAN.JOHN.PAUL [redacted] Digitally signed by NOLAN.JOHN.PAUL [redacted]
Date: 2024.07.25 12:04:52 -04'00'

John Nolan
U.S. Coast Guard
Appellate Government Counsel
Commandant (CG-LMJ)
[redacted]

IN THE UNITED STATES COAST GUARD
COURT OF CRIMINAL APPEALS

UNITED STATES,
Appellee

v.

Erick R. KELLEY
Electronics Technician
Second Class (E-5)
U.S. Coast Guard,
Appellant

26 July 2024

APPELLEE'S CONSENT MOTION FOR FIRST ENLARGEMENT OF TIME TO FILE ANSWER, FILED 25 JULY 2024

CGCMG 0396

DOCKET NO. 1495

ORDER

On consideration of Appellee's Consent Motion for First Enlargement of Time to File Answer, it is, by the Court, this 26th day of July, 2024,

ORDERED:

That Appellee's Motion for Enlargement of Time is hereby granted, up to and including 03 September, as requested by Appellee.

For the Court,
VALDES.SARAH.P[redacted] Digitally signed by VALDES.SARAH.P[redacted] 07.26 08:25:05 -04'00'
P. Valdes
Clerk of the Court

Copy: Judge Advocate General's Representative
Appellate Government Counsel
Appellate Defense Counsel

IN THE UNITED STATES COAST GUARD
COURT OF CRIMINAL APPEALS

UNITED STATES,	27 August 2024
Appellee	**CONSENT MOTION FOR SECOND ENLARGEMENT OF TIME TO FILE ANSWER**
v.	Dkt. No. 1495 Case No. CGCMG 0396 Before McClelland, Havranek, Brubaker
ERICK R. KELLEY, Electronics Technician Second Class (E-5) U.S. Coast Guard, *Appellant*	Tried at Alameda, CA from 15 to 21 May 2023, before a General Court-Martial convened by Commander, U.S. Coast Guard Pacific Area

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John Nolan
U.S. Coast Guard
Appellate Government Counsel
Commandant (CG-LMJ)
[redacted]

TO THE HONORABLE JUDGES OF THE UNITED STATES COAST GUARD COURT OF CRIMINAL APPEALS

Pursuant to Rule 23.2 of this Court's Rules, the Government hereby respectfully moves for a 30-day enlargement of time in which to file an Answer to Appellant's Assignments of Error. The Answer is currently due on Tuesday, 3 September 2024. This is the Government's second request for an enlargement of time. Appellant, through counsel, consents to this motion.

There is good cause to grant this motion. The record in this matter is extensive (3,400+ pages; 100+ appellate exhibits). While counsel has completed review of the record, the seven (7) asserted Assignments of Error require additional research and analysis. The Government further notes that the Deputy Chief of the Office of Military Justice was reassigned (without immediate replacement) during this period; the impact of that reassignment has served as an additional contributing factor in the need for the requested enlargement.

Accordingly, the United States respectfully requests an enlargement of time up to and including Thursday, 3 October 2024 to file its Answer.

Respectfully submitted,

NOLAN.JOHN.PAUL [redacted]
Digitally signed by NOLAN.JOHN.PAU [redacted]
Date: 2024.08.27 08:25:30 -04'00'

DATE: 27 August 2024

John Nolan
U.S. Coast Guard
Appellate Government Counsel
Commandant (CG-LMJ)
[redacted]

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was delivered to the Court and opposing counsel via e-mail on 27 August 2024.

NOLAN.JOHN.PA[redacted] Digitally signed by NOLAN.JOHN.PAUL[redacted] Date: 2024.08.27 08:26:07 -04'00'

John Nolan
U.S. Coast Guard
Appellate Government Counsel
Commandant (CG-LMJ)
[redacted]

IN THE UNITED STATES COAST GUARD
COURT OF CRIMINAL APPEALS

UNITED STATES,
Appellee

v.

Erick R. KELLEY
Electronics Technician
Second Class (E-5)
U.S. Coast Guard,
Appellant

27 August 2024

APPELLEE'S CONSENT MOTION FOR SECOND ENLARGEMENT OF TIME TO FILE ANSWER, FILED 27 AUGUST 2024

CGCMG 0396

DOCKET NO. 1495

ORDER

On consideration of Appellee's Consent Motion for Second Enlargement of Time to File Answer, it is, by the Court, this 27th day of August, 2024,

ORDERED:

That Appellee's Motion for Enlargement of Time is hereby granted, up to and including 03 October, as requested by Appellee.

For the Court,
VALDES.SARAH.P. [redacted] Digitally signed by VALDES.SARAH.P [redacted] Date: 2024.08.27 10:57:30 -04'00'
Sarah P. Valdes
Clerk of the Court

Copy: Judge Advocate General's Representative
Appellate Government Counsel
Appellate Defense Counsel

IN THE UNITED STATES COAST GUARD
COURT OF CRIMINAL APPEALS

UNITED STATES,	25 September 2024
Appellee	**CONSENT MOTION FOR THIRD ENLARGEMENT OF TIME TO FILE ANSWER**
v.	Dkt. No. 1495 Case No. CGCMG 0396 Before McClelland, Havranek, Brubaker
ERICK R. KELLEY, Electronics Technician Second Class (E-5) U.S. Coast Guard, *Appellant*	Tried at Alameda, CA from 15 to 21 May 2023, before a General Court-Martial convened by Commander, U.S. Coast Guard Pacific Area

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John Nolan
U.S. Coast Guard
Appellate Government Counsel
Commandant (CG-LMJ)
[redacted]

TO THE HONORABLE JUDGES OF THE UNITED STATES COAST GUARD COURT OF CRIMINAL APPEALS

Pursuant to Rule 23.2 of this Court's Rules, the Government hereby respectfully moves for a 28-day enlargement of time in which to file an Answer to Appellant's Assignments of Error. The Answer is currently due on Thursday, 3 October 2024. This is the Government's third request for an enlargement of time. Appellant, through counsel, consents to this motion.

There is good cause to grant this motion. While counsel has reviewed the lengthy record in this matter (3,400+ pages), three of the seven Assignments of Error require more research and analysis than originally contemplated. An additional contributing factor is that undersigned counsel contracted COVID-19 during this period. While counsel expects to recover in short order, this too has added to the need for additional time with this matter.

Accordingly, the United States respectfully requests an enlargement of time up to and including Thursday, 31 October 2024 to file its Answer.

Respectfully submitted,

NOLAN.JOHN.PAUL [redacted] Digitally signed by NOLAN.JOHN.PAUL [redacted] Date: 2024.09.25 13:53:12 -04'00'

DATE: 25 September 2024

John Nolan
U.S. Coast Guard
Appellate Government Counsel
Commandant (CG-LMJ)
[redacted]

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was delivered to the Court and opposing counsel via e-mail on 25 September 2024.

NOLAN.JOHN.PA[redacted]
UL[redacted]
Digitally signed by [redacted]AN.JOHN.PAUL[redacted]
Date: 2024.09.25 13:53:51 -04'00'

John Nolan
U.S. Coast Guard
Appellate Government Counsel
Commandant (CG-LMJ)
[redacted]

IN THE UNITED STATES COAST GUARD
COURT OF CRIMINAL APPEALS

UNITED STATES,
Appellee

v.

Erick R. KELLEY
Electronics Technician
Second Class (E-5)
U.S. Coast Guard,
Appellant

26 September 2024

APPELLEE'S CONSENT MOTION FOR THIRD ENLARGEMENT OF TIME TO FILE ANSWER, FILED 25 SEPTEMBER 2024

CGCMG 0396

DOCKET NO. 1495

ORDER

On consideration of Appellee's Consent Motion for Third Enlargement of Time to File Answer, it is, by the Court, this 26th day of September, 2024,

ORDERED:

That Appellee's Motion for Enlargement of Time is hereby granted, up to and including 31 October, as requested by Appellee.

For the Court,
VALDES.SARAH.P. [redacted] Digitally signed by [redacted] S.SARAH.P [redacted] Date: 2024.09.26 10:26:06 -04'00'
Sarah P. Valdes
Clerk of the Court

Copy: Judge Advocate General's Representative
Appellate Government Counsel
Appellate Defense Counsel

IN THE UNITED STATES COAST GUARD
COURT OF CRIMINAL APPEALS

UNITED STATES,	31 October 2024
Appellee	**GOVERNMENT'S ANSWER TO APPELLANT'S ASSIGNMENTS OF ERROR**
v.	Dkt. No. 1495 Case No. CGCMG 0396 Before McClelland, Havranek, Brubaker
ERICK R. KELLEY, Electronics Technician Second Class (E-5) U.S. Coast Guard, *Appellant*	Tried at Alameda, CA from 15 to 21 May 2023, before a General Court-Martial convened by Commander, U.S. Coast Guard Pacific Area

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John Nolan
U.S. Coast Guard
Appellate Government Counsel
Commandant (CG-LMJ)
[redacted]

TO THE HONORABLE JUDGES OF THE UNITED STATES COAST GUARD COURT OF CRIMINAL APPEALS

The United States, through undersigned counsel, submits this Answer in response to Appellant's Assignments of Error.

STATEMENT OF STATUTORY JURISDICTION

Appellant's approved sentence at general court-martial included a dishonorable discharge. Accordingly, this Court has jurisdiction.[1]

STATEMENT OF THE CASE

On 21 May 2023, contrary to his pleas, a general-court martial convicted Appellant of one specification of knowingly and wrongfully possessing child pornography in violation of Article 134, UCMJ.[2] The Military Judge sentenced him to twelve months' confinement, reduction to E-1, and a dishonorable discharge.[3]

ISSUES PRESENTED

I. WHETHER APPELLANT WAS ACQUITTED.

II. WHETHER APPELLANT WAS DEPRIVED OF DUE PROCESS WHEN HE WAS CONVICTED OF OFFENSES DIFFERENT FROM: THOSE CHARGED IN SPECIFICATION 1, THOSE THAT SERVED AS THE BASIS FOR THE ARTICLE 32 PRELIMINARY HEARING AND THE PRELIMINARY HEARING OFFICER'S PROBABLE CAUSE DETERMINATION, AND THOSE THAT SERVED AS THE BASIS FOR THE ARTICLE 34 ADVICE AND REFERRAL.

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[1] Article 66(b)(3), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866(b)(3).

[2] Statement of Trial Results (STR) at 2; 10 U.S.C. § 934. Specification 1 charged that Appellant did "on or about May 18, 2020, knowingly and wrongfully possess child pornography, to wit: eight digital images of a minor, engaging in sexually explicit conduct, and that said conduct was of a nature to bring discredit upon the armed services." He was found guilty "except the word, eight, of the excepted word not guilty." App. Ex. 105 at 1. Appellant was acquitted of Specification 2, alleging distribution of child pornography in violation of Article 134, UCMJ.

[3] STR at 1.

III. WHETHER THE COURT-MARTIAL LACKED JURISDICTION BECAUSE THE MILITARY JUDGE ERRONEOUSLY INSTRUCTED THE MEMBERS ON ADDITIONAL OFFENSES TO BE CONSIDERED AS PART OF SPECIFICATION 1 AFTER REFERRAL, OVER DEFENSE OBJECTIONS, WITHOUT WITHDRAWING, PREFERRAL ANEW, AND WITHOUT SUBSEQUENT REFERRAL, AS REQUIRED BY R.C.M. 603.

IV. WHETHER THE MEMBERS' FINDINGS CONSTITUTED A FATAL VARIANCE OF SPECIFICATION 1.

V. WHETHER THE MILITARY JUDGE ERRONEOUSLY FAILED TO CONDUCT A PROPER INQUIRY INTO THE PANEL MEMBERS' QUESTIONS (CLARIFYING THAT THEY ACQUITTED AFTER THEIR INITIAL VOTE ON BOTH SPECIFICATIONS), AND IMPROPERLY INSTRUCTED THE MEMBERS REGARDING VOTING PROCEDURES.

VI. WHETHER APPELLANT RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS COUNSEL FAILED TO CLEARLY ASSERT AND MAINTAIN OBJECTIONS TO THE MILITARY JUDGE'S ERRONEOUS INSTRUCTIONS TO THE PANEL, AND TO THE MILITARY JUDGE ALLOWING ADDITIONAL OFFENSES TO BE CONSIDERED AS PART OF SPECIFICATION 1.

VII. WHETHER THE EVIDENCE IN SPECIFICATION 1 OF THE CHARGE WAS LEGALLY AND FACTUALLY SUFFICIENT.

STATEMENT OF FACTS

A. Facts Related to the Underlying Conduct and the Investigation.

1. *Initial investigation*. The Alaska Bureau of Investigation's Technical Crimes Unit (TCU) participates in a multiagency task force called Internet Crimes Against Children (ICAC).[4] In connection with that task force, TCU utilizes a program called "Torrential Downpour."[5] Through this program, officers establish undercover links to peer-to-peer filesharing programs, and then seek out and download "files of interest," meaning child pornography that is made

[4] R. at 500 (17 May 2023).

[5] *See* R. at 616 (17 May 2023).

available to share with other internet users.[6] Alaska State Trooper [redacted] was assigned as an investigator to TCU, and, as part of his duties, he operated Torrential Downpour to locate such files coming from internet protocol ("IP") addresses within the state of Alaska.[7] On May 18, 2020, using Torrential Downpour, Trooper [redacted] was able to receive two child pornography videos[8] from an IP address matching Appellant's residence.[9] Because that residence was located on Coast Guard base housing in Kodiak, Alaska, Trooper [redacted] passed the information on to the Coast Guard Investigative Service (CGIS).[10] CGIS received and executed a search warrant for Appellant's residence,[11] seizing a number of Appellant's electronic devices.[12]

2. *Extraction and forensics*. The data on Appellant's cellphone was examined by the Federal Bureau of Investigation (FBI), working in coordination with other law enforcement organizations.[13] A number of images found in the phone's cache files matched images identified

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[6] R. at 501, 555 (17 May 2023). In a normal peer-to-peer download, a file would be downloaded simultaneously from multiple computers to allow for faster download speeds. However, Torrential Downpour allows downloads only from a single computer, in order to identify the source of a child pornography file. *See* R. at 503-04, 559 (17 May 2023).

[7] R. at 500-01, 505 (17 May 2023).

[8] R. at 504-12 (17 May 2023). Identified at trial as Siberian Mouse 96 and Siberian Mouse 128, those videos ultimately were the basis for Specification 2, alleging distribution of child pornography, of which Appellant was acquitted. *See* R. at 527, 554 (17 May 2023); STR at 2.

[9] R. at 515. Customer records from the internet service provider show that Appellant had leased the IP address during the relevant period. R. at 505-09, 514-16 (17 May 2023).

[10] R. at 516-17 (17 May 2023).

[11] R. at 638 (17 May 2023).

[12] R. at 643-44, 650 (17 May 2023). Appellant was interviewed at the scene; he confirmed his internet provider and acknowledged using peer-to-peer software to download pornography (but not child pornography). R. at 642-45 (17 May 2023).

[13] Coordinating agencies and organizations included the Northwest Regional Computer Forensics Laboratory, the Homeland Security Cyber Crimes Center, and the National Center for Missing and Exploited Children (NCMEC). *See* R. at 650, 715 (17 May 2023).

with known child victims.[14] By analyzing metadata, the Government's forensic expert was able to identify documents that had been deleted. For example, at the point of extraction, the Hebes.pdf file was no longer accessible, but a copy of it remained within the cache of the phone's Hancom Office Suite.[15] Hebes.pdf was also listed on the phone's "recent" file—meaning that it was one of the twenty most recently accessed files on that phone.[16]

B. Facts Related to Use of Individual Images (Assignments of Error II, III, IV, and VI).

1. *Article 32*. A preliminary hearing was conducted; it examined eight images found on Appellant's phone and heard testimony from a forensics expert; the Article 32 officer found that probable cause existed to refer charges to a general court-martial.[17]

2. *Use of images at trial: Military Rule of Evidence 404(b) versus* res gestae *evidence.* The Government's original intent was to prove up the possession offense with the same eight images that were provided to the Article 32 officer; it would introduce additional images of child pornography, but only for limited use pursuant to Rule 404(b).[18] However, during the course of pretrial motions, the Government switched gears: Rather than introduce additional images of child pornography under 404(b), it now indicated that it would introduce such images as *res*

[14] "Cache is . . . designed by either the operating system or by various programs to maintain data about the activity that's occurring within that application or device. It's designed to allow the operating system or the program . . . to work more efficiently so it doesn't have to reload, reinterpret all the data every time it opens." R. at 290-91 (19 May 2023).

[15] Hancom Office Suite is a default preinstalled document reviewer for Android phones. *See id*.

[16] R. at 293-99 (19 May 2023). An image of the first page of Hebes.pdf was also found in a separate location as a thumbnail file; such a file can only be created if the image, if opened, would have been visible to the user. R. at 300-03 (19 May 2023).

[17] *See* R. C. Wright memo of 24 May 2022 (Article 32 report).

[18] *See* App. Ex. XV (Government Response to Defense Motion to Exclude) (11 Oct. 2022).

gestae of the underlying offense.[19] In other words, those images of child pornography would be available for *all* purposes—including to prove the underlying offense itself.[20]

An Article 39(a) session was held to hear arguments on this issue. During that session, defense counsel fully accepted the Government's *res gestae* argument.[21] He did express one concern, however: Insufficient notice. He had been preparing for trial consistent with the Government's originally expressed intent—i.e., that it would substantively rely solely on the same eight images used at the Article 32 hearing.[22] Defense counsel argued that, given the late notice of the new Government strategy, he needed more time to prepare—thus, he requested a

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[19] *See* App. Ex. XVII (Government Response to Defense Motion to Exclude) (12 Dec. 2022).

[20] See R. at 115-16 (Article 39(a) session of 20 Dec 2022) (military judge) ("So, beginning with the res gestae argument, so you're not even saying this is an example towards res gestae, being intrinsic with the charged offense. You're saying this is material of the charged offense."). *See United States v. St. Jean*, 83 M.J. 109, 112 (C.A.A.F. 2023) (defining *res gestae* as "the events at issue, or other events contemporaneous with them") (citation omitted). Evidence is intrinsic if it directly proves the charged offense or is so closely intertwined with the offense charged as to be "part and parcel" of that offense. *See United States v. Keith*, 17 M.J. 1078, 1079-80 (A.F.C.M.R. 1984). The additional images to which this argument applied included the two files (Hebes.pdf and Image 720d) that ultimately were selected by the members in connection with their guilty finding on the possession offense.

[21] R. at 121 (Article 39(a) session of 20 Dec 2022). Defense counsel recognized that the Government had the option of introducing the Hebes.pdf file as either *res gestae* or as 404(b) evidence. While defense counsel offered argument on the 404(b) option, he conceded that, ultimately, the Government could simply opt to introduce the document as *res gestae*. *See id*. ("[T]he government has a broad range of flexibility in carrying its burden."). Defense had previously made the same concession with respect to the other additional images. *See* App. Ex. XIV (Motion to Exclude of 28 Sep. 2022) ("Defense has no objection to item "e" and concurs with the Government that this evidence would qualify as res gestae.").

[22] R. at 151 (Article 39(a) of 20 Dec. 2022).

30-day continuance.[23] The Government did not object; the military judge granted it.[24] Shortly thereafter, the military judge documented the resolution of the issue:

> On the record during the hearing . . . the Defense objected to the Government admitting images other than those images identified during the preliminary hearing to prove the charged offenses. Specifically, the Defense objected to the Government using images found on the "Hebes".pdf document to prove the charged offenses. . . . This objection was based on insufficient notice—that the Government had identified only eight images at the preliminary hearing to prove the charged offenses and should be precluded from thereafter expanding the scope due to insufficient notice. The Defense then withdrew this objection in an email following the 20 December 2022 hearing. . . .[25]

3. *Selecting images to include on the Findings Worksheet*. Because of the risk of an ambiguous verdict, all agreed that the Findings Worksheet should list out individual images of child pornography.[26] The Government identified eleven images to be listed: seven images that had been presented to the Article 32 officer and four that had not.[27] Defense counsel indicated initial confusion with this approach; he thought that the images listed would be the original eight images from the Article 32.[28] After the military judge noted that defense counsel had already seemingly conceded the point, defense counsel responded: "I think I may be splitting hairs on our position regarding admissibility to prove the elements (i.e., the mens rea in the mind of the accused based on other images of the same person . . . .) versus what the charged images are. Or

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[23] R. at 151 (Article 39(a) of 20 Dec. 2022).

[24] R. at 158 (Article 39(a) of 20 Dec. 2022).

[25] App. Ex. XIX (Ruling on Defense Motion to Exclude) (13 Feb. 2023) (emphasis added).

[26] R. at 979-83 (Article 39(a) of 18 May 2023).

[27] To be clear, the Government planned to introduce more than eleven images of child pornography during trial, all under the evidentiary theory of *res gestae*. The eleven images included on the Findings Worksheet represented a subset of these images. *See* R. at 914-17 (18 May 2023).

[28] *See* App. Ex. 48 (Email from defense counsel) (14 May 2023).

I could be completely off. I'll review and raise it tomorrow as needed."[29] Defense counsel did not, however, raise the issue again; two days later, he confirmed he had no objection:

> Military Judge: [W]e had some discussion at an earlier 802 on the Findings Worksheet. . . . *Is there a meeting of the minds between defense and trial counsel on what images trial counsel will offer to the members, that they believe constitute child pornography?*
>
> Defense Counsel: I believe at this point we're just—some details on format, Your Honor. *We've reviewed the 11 identified images. We have no issues with those*.
>
> Military Judge: That sounds good. I think as long as the notice issue of what images are going to be offered as child pornography, as long as there [are] no issues from defense, the final tweaks to the Findings Worksheet, we can handle that as the week progresses. *And just to be clear again, defense, there's no issue as in terms of notice of what you—what you expect the government to offer as [child pornography]*?
>
> Defense Counsel: Some of these items were originally contemplated as 404(b). The court ruled on the continuance, one of the items in that continuance was, I believe, a waiver or a withdrawal of [a] defense objection over the use of certain images to potentially prove the charged 8 images. We can get into the issue of the variance instruction if they find more than 8, but we don't think . . . that really needs to be addressed at this time. . . . *The only thing was which images the government would select. And we are tracking what those selections are.*[30]

The Findings Worksheet was refined several times; it ultimately listed the eleven images selected by the Government.[31] In finding Appellant guilty of possession, the members selected two documents from the Findings Worksheet: the Hebes.pdf document and Image 720d.

C. Facts Related to the Members' Question (Assignments of Error I, V, and VI).

1. *Instructions to the members*. After the defense rested, the military judge provided instructions—previously agreed to by the parties—to the members:

> [V]ote on specifications first then [the] charge . . . . Concurrence of at least three-fourths of the members present, when the vote is taken, is required for any finding of guilt. Since we have seven members, that means that six members must concur in any finding of guilty. If you have at least six votes of guilty of any offense, then that will

[29] App. Ex. at 48 (email exchange of 14 May 2023).

[30] R. at 470-72 (Article 39(a) on 16 May 2023) (emphasis added).

[31] *See* App. Ex. CV.

> result in a finding of guilty for that offense. If fewer than six members vote for a finding of guilty, then your ballot resulted in a finding of not guilty. You may reconsider any finding prior to its being announced in open court. However, after you vote, if any member expresses a desire to reconsider any finding, open the court, and the president should announce only that reconsideration of a finding has been proposed. In this circumstance, do not state whether the finding proposed to be reconsidered is a finding of guilty or not guilty or which specification is involved. I will then give you specific instructions on the procedure for reconsideration.[32]

The military judge then provided the panel with the Findings Worksheet, which he walked through with the members.[33] As to Specification 1 (possession), he noted:

> [I]f you find the accused guilty of possessing any images of child pornography, you must check which images you found him guilty of possessing on the third page of the findings worksheet. . . . [C]ross out those images which you find him not guilty of possessing.[34]

2. *Members' note*. Several hours after deliberations had begun, the panel submitted a note to the military judge.[35] It stated: "[W]e voted on both specs. But we don't have ¾ majority on any individual files. We weren't clear on how to come to consensus on each file (page 3 of 3) or if that's required."[36] Defense counsel asserted that the panel's note revealed a finding of not guilty and moved for an appropriate determination by the military judge.[37] Deferring on that motion, the military judge turned to how to further instruct the members; he suggested that he would re-read the previously-provided instructions on voting procedures, with a slight modification—he would add that "[y]ou must also have at least six votes of guilty regarding any

[32] R. at 117-19 (21 May 2023).

[33] R. at 121-123 (21 May 2023).

[34] R. at 121 (21 May 2023).

[35] R. at 134 (21 May 2023); App. Ex. CVII.

[36] App. Ex. CVII.

[37] R. at 135 (21 May 2023).

specific image or video."[38] Defense counsel responded: "The defense would not object to that, Your Honor."[39] The military judge then did so.[40]

3. *The findings*. The members returned to deliberations, and when they were completed, provided their findings to the military judge.[41] The members found Appellant guilty of possession of child pornography, selecting images identified as "Hebes.pdf" and "720d."[42]

ARGUMENT

I. THE MEMBERS' NOTE TO THE MILITARY JUDGE DOES NOT UNDERMINE THE GUILTY VERDICT.

A. Standard of review. This challenge presents a mixed question of the military judge's findings of fact and conclusions of law. A reviewing court will find that a military judge abused his discretion only if either the "findings of fact are clearly erroneous or [the] conclusions of law are incorrect."[43] Such a finding requires "more than a mere difference of opinion."[44]

B. Discussion. As noted above, during deliberations the members sent a note to the military judge: "we voted on both specs. But we don't have ¾ majority on any individual files. We weren't clear on how to come to consensus on each file (page 3 of 3) or if that's required."[45] Appellant asserts that (1) the note reflected an unambiguous finding of not guilty; (2) the members' ultimate finding (guilty with respect to two images) reflected a reconsideration; and

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[38] R. at 141 (21 May 2023).

[39] R. at 141 (21 May 2023).

[40] R. at 142-43 (21 May 2023).

[41] R. at 150 (21 May 2023).

[42] App. Ex. CV (Findings Worksheet).

[43] *United States v. Buford*, 74 M.J. 98, 100 (C.A.A.F. 2015) (citations omitted).

[44] *Id.* (citations and quotation marks omitted).

[45] App. Ex. 107.

(3) because the members had not followed the military judge's instructions on reconsideration, the guilty verdict must be set aside.[46] Appellant's argument, however, fails on all counts. First, the members' note leaves significant doubt as to whether any formal vote on images was held. Second, even if it had, and even if the members failed to follow the judge's instructions on initiating a reconsideration vote, that does not undermine an otherwise unambiguous guilty verdict.

1. *The note did not reflect an unambiguous finding of not guilty.* First, the note itself suggests that no formal vote was taken. There are two principal clauses in the note: One informs the judge on the status of their discussions ("we don't have ¾ majority on any individual files") whereas the other seeks information on "how to come to consensus or if that's required." The explanation that makes sense with respect to *both* clauses is that the members had taken a straw poll, but had not yet formally voted. As the military judge pointed out, the phrase "come to consensus" is not particularly indicative of a panel that has *fully completed* its formal voting requirements.[47] That phrase recognizes that more work needs to be done; the members simply need clarification as to how to do it.[48] Moreover, straw polls are not only perfectly proper,[49] but

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[46] Appellant's Br. at 27-34.

[47] App. Ex. 119 at 7.

[48] *See United States v. Thomas*, 39 M.J. 626, 639 (N-M. Ct. Crim. App. 1993) ("Clearly, if a vote is taken in full recognition that certain questions remain unanswered and will require additional discussion before the final verdict, the earlier vote is no more than a tentative, non-binding straw poll . . . .").

[49] *Id.* ("'Straw polls' are permitted by military law. . . . . The essence of a straw poll during deliberations is that it is a non-binding vote taken to determine the members' tentative position prior to subsequent discussions before the final binding vote that will determine the finding. The preferred method of conducting such a poll is through a written ballot rather than orally because the danger that influence of superiority in rank will be employed improperly is lessened by the secrecy of the written ballot. There is no requirement that reconsideration procedures follow a

also quite common in practice and well known in contemporary culture.[50] This further enhances the likelihood that this is what actually occurred here.

Second, the members were also unlikely to have conducted a formal vote on the individual images because they had not been given any instructions to do so. It is true that the instructions were quite specific on voting procedures, at least with respect to *specifications* (these come first) and with respect to *charges* (these comes second).[51] But the instructions with respect to *individual images* were scant; members were merely instructed to "check" or "cross out" the images on the finding worksheet.[52] The instructions do not mention the word "vote" with respect to the selection of images, so it was not even clear whether the strictures of formal voting (secret ballot, junior member counting, and so on) even applied to the choice of individual images.[53] Appellant might insist that it was obvious that the images and the specification would

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straw poll which is taken prior to a binding vote on findings."); *see also United States v. Longshore*, No. 202200177, 2024 WL 442540, at *8 (N-M. Ct. Crim. App. Feb. 6, 2024) ("[T]he use of straw polls is not prohibited and does not, itself, constitute reversible error."); *United States v. Lawson*, 16 M.J. 38, 41 (C.M.A. 1983) ("[A] 'straw poll'—an informal, non-binding vote—is not specifically prohibited by the Code and Manual and in some instances may amount to little more than a means for the court members to express their tentative views—which is permissible.").

[50] *See, e.g.*, 12 Angry Men (Orion-Nova Productions 1957).

[51] R. at 121-123 (21 May 2023).

[52] R. at 121 (21 May 2023).

[53] This is also ambiguous for a separate reason. It is not clear that the selection of individual images even constitutes a *finding* under the Rules for Court-Martial. *See* R.C.M. 921 ("The general *findings* of a court-martial state whether the accused is *guilty* of each charge and specification.") (emphasis added). This is particularly true where, as here, a choice of individual images is not required to reach a lawful verdict. *United States v. Piolunek*, 74 M.J. 107 (C.A.A.F. 2015) (upholding general verdict principles with respect to individual images in a child pornography case). Indeed, the military judge here instructed the members to make additional findings—as to specific images—because it was potentially *useful* for appellate review, but not because it was *legally required*. *See* R. at 979 (Art. 39, 18 May 2023)

be voted upon at the same time. But nothing in the instructions says so. In fact, if members had proceeded step-by-step in the order set out on the findings worksheet, they would have arrived at the individual images (on page 3) having already voted guilty on the possession specification (on page 1), adding to the confusion. If courts must presume that the members follow the judge's instructions,[54] it stands to reason that the court may presume that members will ask for clarification when those instructions are unclear—*before* proceeding.

In the end, the military judge provided such clarification. In particular, the military judge added a new sentence to the previous voting instructions: "You must also have at least 6 votes of guilty regarding any specific image or video."[55] This clarification had the desired effect, and the members were able to complete their deliberations.[56] The fact that they were able to do so in short order further suggests that no formal vote had previously taken place; there was nothing to reconsider; the panel need only complete their "full and fair" discussion, then vote, and then fill out the worksheet.[57] When considered in total, the evidence suggests that the members did not reach a finding, thus, no reconsideration was needed. Accordingly, the final (guilty) verdict should be affirmed.

(discussing with counsel the potential impact of *United States v. Dow*, No. 20200462, 2022 WL 2161607 (Army Ct. Crim. App. June 14, 2022)). If selection of individual images does not constitute a finding in the first place, then reconsideration would not even apply. *See* R.C.M. 924 ("Members may reconsider any *finding* reached by them . . . .") (emphasis added).

[54] *United States v. Loving*, 41 M.J. 213, 235 (C.A.A.F. 1994).

[55] R. at 141 (21 May 2023).

[56] R. at 150 (21 May 2023).

[57] This dovetails with the additional indicia that no formal vote was taken, as found by the military judge. *See* App. Ex. 119 at 8 (noting that the "findings worksheet did not have any additional markings on it, which may have suggested that the panel had voted and then changed their finding.").

2. *Even if there was an initial finding of not guilty—and even if the members then failed to follow instructions on reconsideration—the final guilty verdict stands*.

As the military judge noted, impeachment of an otherwise proper verdict is permitted only in the narrowest of circumstances:

> Findings which are proper on their face may be impeached only when extraneous prejudicial information was improperly brought to the attention of a member, outside influence was improperly brought to bear on any member, or unlawful command influence was brought to bear on any member.[58]

None of these circumstances—prejudicial information, outside influence, or unlawful command influence—is alleged here. Instead, this Assignment of Error is predicated on two assumptions: first, that the members took a formal vote; and second, that they did not follow the judge's reconsideration instructions. However this allegation is phrased, it simply does not fall within the narrow bounds of R.C.M. 923 outlined above. For this additional reason, the claim fails.

II. THERE WAS NO DUE PROCESS VIOLATION IN THE SELECTION OF IMAGES UNDERLYING THE CHARGE.

A. Standard of review. Whether a due process violation occurred is a question of law reviewed *de novo*.[59] Whether an alleged error is waived is also reviewed *de novo*."[60] If only forfeited, the underlying question of law is reviewed for plain error.[61]

B. Discussion. In finding Appellant guilty of possession of child pornography, the members selected two images (Hebes.pdf and Image 720d) that had not been provided to the Article 32 officer. This fact animates at least four separate Assignments of Error, including this

[58] R.C.M. 923, *quoted in* App. Ex. 119 at 5.

[59] *United States v. Grijalva*, 84 M.J. 433, 435 (C.A.A.F. 2024).

[60] *United States v. Davis*, 79 M.J. 329, 331 (C.A.A.F. 2020) (citation omitted).

[61] *United States v. Mieres*, 84 M.J. 682, 687 (C.G.C.C.A. 2024) (citation omitted).

one. Here, Appellant argues that his due process rights were violated, in that he has been convicted of possession of different images of pornography than those that informed the drafting of the charges against him. This claim, however, was waived. Even if not waived, it fails because the language of the specification did not limit the Government's choice in which images to rely on.

1. *This claim was waived*. At trial, Appellant made no objection on the grounds alleged here. That is not because the issue was overlooked. On the contrary, as described below, defnse counsel identified the issue with the military judge, signaled a possible objection on these grounds, but ultimately decided against it. This is a "deliberate decision not to present a ground for relief that might be available in the law,"[62]and thus constitutes waiver.

Noted in the Statement of Facts were two prominent areas of discussion on the images:

- Initial discussions (404(b) vs. *res gestae*): The Government originally planned to rely on the same images that were presented at the Article 32, while introducing other images only for limited purposes under Rule 404(b).[63] However, the Government soon switched gears, offering all child pornography images as *res gestae* evidence, available for any purpose in supporting the underlying specification.[64] Defense counsel agreed that the Government could do so.[65]

- Findings Worksheet. On the eve of trial, the Government notified the court and defense counsel of which images of child pornography it would highlight for the members on the Findings Worksheet.[66] In an email to the military judge, defense counsel expressed surprise about that decision; while he was comfortable that the additional images could be introduced for any purpose at trial, he had understood

[62] *United States v. Campos*, 67 M.J. 330, 332 (C.A.A.F. 2009) (citation omitted) ("Defense counsel had advance notice . . . and considered the impact on his client's case. . . . At trial the military judge presented defense counsel with an opportunity to voice objections . . . and counsel responded that he had [none].").

[63] *See* App. Ex. XV (Government Response to Defense Motion to Exclude) (11 Oct. 2022).

[64] See App. Ex. XVII (Government Response to Defense Motion to Exclude) (12 Dec. 2022)

[65] R. at 121 (Article 39(a) session of 20 Dec 2022).

[66] *See* App. Ex. 48 (email from defense counsel) (14 May 2023).

> that the images on the Findings Worksheet would be the same as those presented at the Article 32.[67] Defense counsel then stated: "I may be way off here. I will review and raise tomorrow as needed."[68] But he never did so. Indeed, as the Government and defense worked together on the Findings Worksheet, he informed the judge that "We've reviewed the 11 identified images. We have no issues with those."[69]

Nor did Appellant raise an objection later in the trial. Even after trial there was no hint that such an objection ever occurred: Appellant had been convicted with respect to two images (Hebes.pdf and Image 720d) that were not provided to the Article 32 officer. Accordingly, if Appellant had genuinely made such an objection at trial, he would have been particularly motivated to remind the military judge of that fact in his post-trial motion for a finding of not guilty. Yet, the motion fails to mention anything of the sort.[70] This is affirmative waiver and defeats Appellant's claim.[71]

2. *Even if not waived, there was no error here—the specification language did not limit the Government's options, and the additional images were fairly included in the specification*.

There are many ways to craft charges under the Uniform Code. But the choices made have consequences both for the Government and for the defense.[72] Here, the Government could have identified (within the specification language) precisely which images would be used to

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[67] *Id.*

[68] *Id*.

[69] R. at 470-72 (Article 39(a) on 16 May 2023).

[70] *See* App. Ex. 110.

[71] *See United States v. Gladue*, 67 M.J. 311, 314 (C.A.A.F. 2009) (accused "may knowingly and voluntarily waive many of the most fundamental protections afforded by the Constitution").

[72] *See, e.g.*, *United States v. English*, 79 M.J. 116, 120 (C.A.A.F. 2019) ("[T]he Government was not required to draft the specification alleging a particular type of force . . . . But when it narrowed the scope of the charged offense by alleging the particular type of force, it was required to prove the facts as alleged.").

prove up the specification. It chose not to do so. That choice gives the Government some measure of flexibility that it would otherwise have forfeited.[73] By failing to acknowledge and give meaning to the Government's choice, Appellant's claims of error here (and in related assignments of error) miss the mark.

Even if the nature of the specification was altered in a metaphysical sense by the change in underlying Government trial strategy, it did not give rise to a due process violation. The Code has never required the type of precision that Appellant posits here—i.e., an absolute match, in all particulars, between the act underlying the charge and the act underlying the conviction. Indeed, the R.C.M. openly acknowledges flexibility in this regard, and sets out parameters for dealing with such differences in its rules on variance.[74]

It is true that in extraordinary cases, a mismatch between the act underlying the charge and the act underlying the conviction may be so vast that a due process issue arises.[75] In this regard, Appellant explains that there are genuine differences between images: each has its own unique metadata, some appear in different cache files, some are in unusual formats, and some, such as the Hebes.pdf, are more obviously revolting than others.[76] For trial preparation

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[73] Of course, such flexibility must be exercised consistent with fair notice. In that regard, the Government acknowledges that the language used in the specification ("eight images") sent a strong initial signal that the Government would move forward solely on the eight images presented to the Article 32 officer. Here, however, that potential problem was cured by open dialogue prior to trial. *See* Findings of Fact ¶ B. So long as defense has adequate notice, the Government retains the flexibility provided by the text of the specification. *See United States v. Fosler*, 70 M.J. 225, 229 (C.A.A.F. 2011) (observing that "[t]he military is a notice pleading jurisdiction").

[74] *See, e.g.*, R.C.M. 918(a)(1).

[75] *See, e.g.*, *United States v. Girouard*, 70 M.J. 5, 10 (C.A.A.F. 2011) (citing cases); Appellant's Br. at 28.

[76] Appellant's Br. at 37-38.

purposes, these differences can be quite important indeed. But such characteristics, while unique, do not transform these images into something that is not "fairly included in the preferred charge."[77] That is: they remain "images" of "child pornography." Moreover, such differences are vastly outweighed by similarities: The images of child pornography used at trial—all of them—arose from the same investigation (described above) and were accessed on the same device (Appellant's Samsung cellphone) in the same timeframe ("on or about 18 May 2023") and same general area (Seward, Alaska).[78] There is also no small measure of fungibility within this overall context: On the one hand, a case involving, say, multiple assaults can involve knotty questions about the consent of a victim or victims for each individual interaction. Here, Appellant's interaction is solely with a known electronic device and the underlying question is more straightforward: he *knowingly and wrongfully possessed* each image at a moment in time, or he didn't.[79] Given the flexibility baked into the specification language chosen by the Government, the relative fungibility of the images themselves, and the nature of the possession charge, the use of these additional images was fair game. Accordingly, even if not waived, this claim fails.

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[77] R.C.M. 602.

[78] From the perspective of a lawful *verdict*, of course, they may be treated as *entirely* fungible. *See United States v. Piolunek*, 74 M.J. 107, 111-112 (C.A.A.F. 2015) (applying general verdict principles to child pornography conviction).

[79] Federal defendants offering challenges similar to Appellant's have had little success. *See, e.g.*, *United States v. Jenkins*, No. 20-13831, 2022 WL 474704, at *4 (11th Cir. Feb. 16, 2022) (rejecting argument that indictment was "constructively amended" when jury was permitted to convict defendant on child pornography charges "based on images that may not have been presented to the grand jury"); *see also United States v. Mumma*, No. 1:20-cr-00168 (E.D. Cal. March 6, 2024) (same) ("Defendant does not explain, from a fairness perspective, why the Government should be limited to the evidence offered at the initiation of a criminal case before the criminal discovery phase has begun.").

III. THE COURT-MARTIAL HAD JURISDICTION OVER THE OFFENSE.

1. Standard of review. Whether changes made to a specification are consistent with the requirements of R.C.M. 603 is reviewed *de novo*.[80]

2. Discussion. As noted in the previous section, Appellant argues that it was error for the Government to prove up the possession specification using different images of child pornography than those provided to the preliminary inquiry officer. Here, that error is stylized as a "major change" under R.C.M. 603. Appellant further asserts that he objected to it at trial, and thus, the charge has no legal basis and the court-martial had no jurisdiction. This claim fails because there was no change in the first place; even if there was, it was a minor change; and defense never objected.

a. *The specification was not changed*. Rule 603 authorizes persons to make changes to specifications before or after referral. It sets out two categories: major and minor changes. A major change is one that "adds a party, an offense, or a substantial matter not fairly included in the preferred charge or specification, or that is likely to mislead the accused as to the offense charged."[81] A minor change is any change not amounting to a major change.[82] However, that distinction is not relevant here, since there was no change in the first place. The specification (as referred) reads exactly the same as the specification as it was submitted to the members for deliberations. Accordingly, R.C.M. 603 does not apply, and this claim fails.

b. *Even if there is a change, it is not a major change*. Appellant claims that, in relying on different images of Appellant's child pornography at trial, the Government *implicitly* "added

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[80] *United States v. Reese*, 76 M.J. 297, 300 (C.A.A.F. 2012).

[81] R.C.M. 603(a)(1).

[82] R.C.M. 603(a)(2).

new offenses" to the specification, thus effectuating a major change. But relying on additional pornographic images at trial does not add to (or even alter) the offense identified in the specification language. That offense remains the same: possession of child pornography. Appellant has confused the nature of the specification language (which can be altered only pursuant to Rule 603) and the nature of evidentiary proof (which can change at any time, consistent with principles of fair notice). In short, use of the images was "fairly included in the preferred charge or specification,"[83] thus, even if it qualifies as a change in any sense, it was not a major one.

c. *Even if this was a major change, Appellant did not object*. R.C.M. 603(d)(1) makes clear that a major change is error only if Appellant objected at trial. As laid out in detail in the previous section, Appellant failed to do so. Accordingly, this claim fails.

IV. THERE WAS NO FATAL VARIANCE.

A. Standard of review. If it is preserved, an allegation of fatal variance is reviewed *de novo*.[84]

B. Discussion. Appellant argues that using different images of child pornography at trial than those used during the preliminary hearing constituted a fatal variance.[85]

1. *This issue was waived.* The facts underlying this Assignment of Error are the same as those underlying Assignment of Error II and III. Even if styled differently here, this issue is

[83] R.C.M. 603(b)(1).

[84] *United States v. Treat*, 73 M.J. 331, 335 (C.A.A.F. 2014).

[85] Appellant's Br. at 52.

waived for the same reason—namely, defense counsel's "deliberate decision not to present a ground for relief that might be available in the law."[86]

2. *There is no variance here*. "A variance between pleadings and proof exists when evidence at trial establishes the commission of a criminal offense by the accused, but the proof does not conform strictly with the offense alleged in the charge."[87] When a variance exists, a factfinder may enter findings of guilty with exceptions and substitutions, so long as the "exceptions and substitutions are not used to substantially change the nature of the offense."[88] But none of that happened here. Indeed—other than the uncontroversial striking of the word "eight" (to align with their selection of only two images[89])—the factfinder here made no exceptions and substitutions; the charge remained in the same form as it was when it was referred. Accordingly, there is no variance to assess in the first place.

3. *If there was a variance, it was not prejudicial*. Appellant asserts that he was prejudiced by the use of different images at trial, in that he was "unable adequately to prepare for trial" and was "denied the opportunity to defend against the charge."[90] The Government concedes that the additional images created challenges for the defense. But defense counsel requested—and received—a thirty-day continuance *precisely in order to* deal with those specific challenges.[91] The record of trial does not reflect any lack of preparation on defense's part, and

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[86] *United States v. Campos*, 67 M.J. 330, 332 (C.A.A.F. 2009) (citation omitted); *see also supra* Sections II and III.

[87] *United States v. English*, 79 M.J. 116, 121 (C.A.A.F. 2019).

[88] *Id.*

[89] *See* App. Ex. 105 (Findings Worksheet).

[90] Appellant's Br. at 55.

[91] R. at 151 (Article 39(a) of 20 Dec. 2022).

Appellant here identifies none. Moreover, Appellant does not articulate how—if given more time—the defense would have altered its defense strategy.[92] Thus, even if not waived—and even if variance applies here—this claim nevertheless fails for lack of prejudice.

V. DEFENSE WAIVED ANY CHALLENGE TO INSTRUCTIONS; THE INSTRUCTIONS WERE PROPER IN ANY EVENT.

A. Standard of review. Whether proper instructions were provided is reviewed *de novo*.[93] However, no review is available when the issue has been waived.[94]

B. Discussion.

1. *The issue is waived.* Pursuant to R.C.M. 920(f), objections to instructions not raised at trial are forfeited. However, when a defense counsel *explicitly informs* a military judge that the defense *does not object* to the proposed instruction, the issue is waived altogether.[95] That is precisely what happened here: The military judge proposed that he re-instruct the members on

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[92] *United States v. Treat*, 73 M.J. 331 (C.A.A.F. 2014) (prejudice inquiry on variance claim) ("Importantly, the defense has not identified for this Court any different trial strategy it might have employed . . . ."). Appellant posits that the particularly vile nature of the images in Hebes.pdf may have prompted defense counsel to adopt a different defense, perhaps sounding in claims of mental health issues. *See* Appellant's Br. at 56. However plausible that notion may be, it is not relevant in this context. The record makes clear that, even if it was not on the Findings Worksheet, Hebes.pdf would have been introduced as *res gestae* evidence. R. at 121 (Article 39(a) session of 20 Dec 2022). The members would see it either way.

[93] *United States v. McDonald*, 57 M.J. 18, 20 (C.A.A.F. 2002).

[94] *See* R.C.M. 905(e); *United States v. Schmidt*, 82 M.J. 68, 72 (C.A.A.F. 2022).

[95] *See United States v. Wilson*, 84 M.J. 383, 396 n.10 (C.A.A.F. 2024) ("[D]efense acquiesced in the language of the instruction when it was proposed and given. Therefore, this issue has been waived on appeal."); *United States v. Davis*, 79 M.J. 329, 330-31 (C.A.A.F. 2020) ("[B]y expressly and unequivocally acquiescing to the military judge's instructions, Appellant waived all objections . . . .").

voting instructions (with slight modifications).[96] Defense counsel immediately responded: "The defense would not object to that, Your Honor."[97] This is clear waiver.[98]

2. *In any event, there was no error*. Even if this issue is not waived, there was no error. After the members' question was examined, and after discussion with counsel, the military judge proposed that he re-read the portion of the instructions that were relevant to the voting procedures, adding only that the members "must also have at least six votes of guilty regarding any specific image or video."[99] Appellant now offers that, instead, the military judge should have "cleared up the ambiguity" regarding what the members had done up to that point, including, if necessary, providing full instructions on reconsideration.[100] However, a question-and-answer session with the members would add considerable risks. Not only are such sessions difficult to predict or control (leading to ill-conceived word choices on the fly), but they may also unwittingly reveal information about the members' deliberations. Moreover, any unsolicited, detailed instructions on reconsideration could quite easily backfire, by appearing to

[96] R. at 141 (21 May 2023).

[97] R. at 141 (21 May 2023).

[98] Defense suggests waiver should not apply because the military judge had not yet acted upon a separate matter—defense's proposed "way ahead." Appellant's Br. at 60. Defense's proposal was that the military judge should "instruct [or] make a finding or to recognize [] a finding of not guilty." R. at 139 (21 May 2023). The military judge immediately responded with skepticism. R. at 139 (21 May 2023) ("I mean, what authority does this court have to do that?"). After opting to table defense's proposal, the discussion turned to how the members' question should be answered. When the military judge proposed to re-instruct the members and have them return to deliberations, defense counsel readily agreed. Defense counsel's agreement had everything to do with the proposed instructions to the members, and nothing to do defense's (now tabled) motion.

[99] R. at 141 (21 May 2023).

[100] Appellant's Br. at 59.

express dissatisfaction with the current lack of consensus on the images.[101] On the whole, this was an unusual and challenging scenario that the military judge, working with counsel, handled with prudence and care. There was no error.

VI. APPELLANT'S COUNSEL WAS NOT INEFFECTIVE.

A. Standard of Review. Ineffective assistance claims are reviewed *de novo*.[102]

B. Discussion. To qualify as ineffective assistance of counsel, an appellant must show, first, that counsel's performance was deficient; that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment."[103] Second, the appellant must show that the deficiency resulted in prejudice, i.e., "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable."[104] This test must be applied "with scrupulous care, lest intrusive post-trial inquiry threaten the integrity of the very adversary process the right to counsel is meant to serve. . . . It is all too tempting to second-guess counsel's assistance after conviction or adverse sentence."[105]

(1) *Instructions following panel's question to the military judge*. After the members' question was examined, the military judge proposed re-instructing the members using essentially the same voting instructions that he had provided previously with a slight modification—he would add that "[y]ou must also have at least six votes of guilty regarding any specific image or

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[101] For this reason, it is no surprise that defense counsel did not suggest anything like the proposal that Appellant now makes here.

[102] *United States v. Metz*, 84 M.J. 421, 428-29 (C.A.A.F. 2024).

[103] *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

[104] *Id.*

[105] *Harrington v. Richter*, 562 U.S. 86, 104 (2011) (quotations and citations omitted); *see also id.* ("An ineffective-assistance claim can function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial . . . .").

video."[106] Defense counsel readily agreed.[107] Appellant here argues that, if that agreement constitutes waiver, then it also constituted ineffective assistance of counsel.[108]

First, defense counsel's decision here was not deficient in any respect. Having the military judge essentially re-instruct the members made a good deal of sense given the context. It provided modest additional instruction targeted precisely at the members' question. In sharp contrast, Appellant's suggestion here—that the military judge ferret out exactly what the members had done, and, if necessary, provide full reconsideration instructions—could have caused serious trouble.[109] For example, just by explaining reconsideration options, one risks *highlighting* those options, tacitly *encouraging* the members to "come to consensus" on the images. That approach would do no favors for the defense. In any event—even if it were a closer call—defense counsel's choice in this highly unusual scenario would still be well within the "wide range of reasonable professional assistance" that passes muster under *Strickland v. Washington*.[110] Even if counsel's performance were somehow deficient, Appellant cannot demonstrate success with *Strickland*'s second prong, as his alternative solution—questioning the members and explaining reconsideration options—could easily have made things worse. This alone defeats his claim.[111]

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[106] R. at 141 (21 May 2023).

[107] R. at 141 (21 May 2023).

[108] Appellant's Br. at 66-67.

[109] Appellant's Br. at 66-67.

[110] 466 U.S. 668, 687 (1984); *see United States v. Palacios-Cueto*, 82 M.J. 323, 327 (C.A.A.F. 2023) (citation omitted); *United States v. Mazza*, 67 M.J. 470, 475 (C.A.A.F. 2009) (court "will not second-guess the strategic or tactical decisions made at trial by defense counsel").

[111] *United States v. Weiser*, 80 M.J. 635, 643 (C.G.C.C.A. 2020) ("The appellant must show that but for the deficient performance, there is a reasonable probability that the outcome would have

(2) *Use of additional images of child pornography to prove up Specification 1*. As reflected in previous sections, Appellant argues that the Government using different images of child pornography than those used during the preliminary hearing constituted error. Appellant here asserts that if that error was waived, then the waiver constituted ineffective assistance.[112] Here again, nothing about defense counsel's representation was deficient. Obviously, the Government's position is that there was no error in the first place.[113] But even if there were, it was neither plain nor obvious based on prior case law.[114] Indeed, it bears noting that the military judge and trial counsel substantially shared defense counsel's view that the Government's approach was permissible.[115] That fact suggests that defense counsel was operating well within "prevailing professional norms" under *Strickland*.[116] Thus, this assignment of error fails.

VII. SPECIFICATION 1 WAS LEGALLY AND FACTUALLY SUFFICIENT.

A. Legal Sufficiency. "The test for legal sufficiency is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."[117] Appellant argues that the

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been different.").

[112] Appellant's Br. at 67-70.

[113] *See generally* Section II, *supra*.

[114] *Id.*; *see also United States v. Schmidt*, 82 M.J. 68, 81-82 (C.A.A.F. 2022) (Maggs, J., concurring) (finding lack of clear case law precedent created "very substantial argument" that counsel was not deficient for failing to raise the alleged issue).

[115] *See generally* Statement of Facts, ¶¶ B2-3.

[116] The alternative approach suggested by Appellant—insist on preferral and referral anew—may itself carry additional risks in a given case. For example, the inevitable delay may give the Government additional opportunities to hone, or even strengthen, its case against a particular accused. Thus, a defense counsel operating within professional norms may decline to demand that the Government walk through those additional steps.

[117] *United States v. Robinson*, 77 M.J. 294, 297–98 (C.A.A.F. 2018) (citation omitted).

evidence was insufficient to show that his possession of child pornography was wrongful, knowing, and conscious. In doing so, Appellant seeks to highlight certain types of evidence that are absent here; for example: there is no confession by the accused; no evidence of incriminating search terms; no chatting with others about shared interest in child pornography.[118] But there is no requirement for certain *types* of evidence; legal sufficiency turns squarely on the *overall strength* of the evidence presented, viewed in the light most favorable to the prosecution. Here, the evidence more than meets the "very low threshold to sustain a conviction."[119] That evidence includes:

- *Investigatory procedures and forensic evidence*. A host of law enforcement professionals were required to bring this case to fruition, from state police to CGIS and FBI analysts and investigators; they explained each step from the initial connection to Appellant's IP address through extraction and analysis, with respect to all the videos and images found on Appellant's phone. On the whole, this evidence was essentially uncontroverted.[120]

- *Expert testimony regarding cache.* This testimony dispelled any notion that cache simply appears on a computer without some deliberate user interaction.[121] This was demonstrated in particular detail with the Hebes.pdf file, which was found in Appellant's "recents" folder, as one of the twenty files most recently accessed, approximately ten days before his phone was seized.[122]

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[118] *See* Appellant's Br. at 72-74.

[119] *United States v. King*, 78 M.J. 218, 221 (C.A.A.F. 2019) (citation omitted).

[120] Appellant is correct in noting (Appellant's Br. at 74) that possession of child pornography, standing alone, does not automatically equate to *knowing* possession. But such evidence can, when combined with other indicia, carry significant weight. *Cf.* R. at 763 (19 May 2023) (FBI expert) (noting that in the course of her investigatory work she has never come across a case of unintentional child pornography possession).

[121] *See, e.g.*, R. at 768 (FBI testimony) ("Cache files are, as a general rule, created from user activities."); R. at 63 (20 May 2023) (to appear in cache, "there's gonna have to be some user interaction to have it there").

[122] R. at 299 (19 May 2023). Appellant suggests that, because the image were found in cache, there is insufficient evidence to demonstrate possession, because cache files are neither intentionally created by the user nor accessible to the user. *See* Appellant's Br. at 72, 74 (citing

- *Evidence of other images and videos.* The members found Appellant guilty only of possession with respect to two files—Hebes.pdf and Image 720d. Nevertheless, even as they acquitted Appellant with respect to other videos and images, the members were entitled to consider evidence that was presented with respect to those videos and images to support their guilty findings. For example, the members may have determined that there was insufficient evidence that Appellant *knowingly distributed* the Siberian Mouse videos, but they may still consider evidence that he *had* those videos in the first place—to support the proposition that he knowingly possessed child pornography.[123]

- *Appellant's testimony*. Appellant insisted that he had never seen any of the images introduced at trial, suggesting that he watched so much pornography that some child pornography may have slipped in without his knowledge.[124] However, this testimony does not square with the expert testimony regarding cache described above. By way of example: The individuals pictured on Hebes.pdf were the youngest of any of the images introduced at trial; the scenes pictured were described as the most obviously horrific.[125] Testimony revealed that the Hebes.pdf file was accessed a mere ten days before his phone was seized.[126] The implication that Appellant could have come across this document and *not remembered it* may have—in particular—caught the members' attention. They were fully entitled to take into account the degree to which Appellant's story held together—or not—in reaching their decision.[127]

United States v. Navrestad, 66 M.J. 262, 268 (C.A.A.F. 2008). This is a red herring. Appellant was not being prosecuted for possessing *cache* files; rather, he was being prosecuted for possessing the *actual* files. Cache files are evidence that Appellant did, in fact, possess the actual files at one time, even if he deleted them before the phone was seized. *See* R. at 146 (20 May 2023); *see also United States v. King*, 78 M.J. 218 (C.A.A.F. 2019) (upholding conviction, where images in cache represented circumstantial evidence that appellant had viewed actual images).

[123] *See United States v. Rosario*, 76 M.J. 114, 188 (C.A.A.F. 2017) (service courts may "independently consider evidence supporting an offense for which an appellant was acquitted in evaluating whether evidence supported a different offense of which an appellant was convicted"). This would be particularly supportive of the members' decision with respect to Image 720d, which depicts the same girl pictured in the Siberian Mouse videos. *See* R. at 15 (May 19, 2023) (expert medical testimony).

[124] R. at 278-79 (20 May 2023).

[125] R. at 99 (21 May 2023).

[126] R. at 299 (19 May 2023).

[127] *See United States v. Pleasant*, 71 M.J. 709, 713 (A.C.C.A. 2012) ("Where some corroborative evidence of guilt exists for the charged offense . . . the Defendant's testimony, denying guilt, may establish, by itself, elements of the offense . . . . This rule applies with special force where

- *Evidence of interest in legal pornography with childhood environments and themes.* Appellant's external hard drive contained numerous images of pornography where adults were placed in childlike environments and in children's clothes.[128] This included a video entitled, "How to Capture a Nubile," which was a pornographic satire based on the TV series "To Catch a Predator," essentially glorifying the sexual assault of underage persons.[129] The members were entitled to consider this evidence as indicative of Appellant's interest in the sexualization of children.[130]

Taken together—and viewed in a light most favorable to the prosecution—this evidence more than meets the "very low threshold" required for legal sufficiency.[131]

B. Factual sufficiency. The test for factual sufficiency is "whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, the members of [this Court] are themselves convinced of the accused's guilt beyond a reasonable doubt."[132] Given the evidence described in the Findings of Fact and again in the

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the elements to be proved for a conviction include highly subjective elements: for example, the defendant's intent or knowledge." (quoting *United States v. Williams*, 390 F.3d 1319, 1325-26 (11th Cir.2004))).

[128] R. at 118-55 (19 May 2023).

[129] R. at 144 (19 May 2023).

[130] *See, e.g.*, *United States v. Durbin*, No. 36969, 2008 WL 5192441 at *4 (A.F. Ct. Crim. App. Dec. 20, 2008) (upholding military judge's admission of evidence of the accused's viewing of adult pornography and legal child model pictures pursuant to M.R.E. 404(b)); *United States v. MacWhinnie*, No. 201900243, 2021 WL 798887 at *2-3 (N-M. Ct. Crim. App. Mar. 2, 2021) (upholding admission of evidence of child erotica and pinterest board titles referencing younger females pursuant to M.R.E. 404(b)).

[131] Appellant also briefly (Appellant's Br. at 76) notes that the Government's medical expert, when assessing Image 720d, stated that he could not determine—based on the image alone—that the pictured girl was under eighteen. AoE at 76. That is an accurate account of the expert's initial testimony—but it stops well short: As the medical expert further explained, he could nevertheless determine that the girl in Image 720d was under eighteen because she was the *same girl* who appeared in two videos *also* in Appellant's possession: Siberian Mouse 96 and Siberian Mouse 128. The expert had already concluded that the girl pictured in those videos was clearly under eighteen. R. at 15 (May 19, 2023). Moreover, there was no discernable age difference between the video and Image 720d—by all accounts she was the same girl at the same age. *Id.*

[132] *United States v. Thompson*, 83 M.J. 1, 4 (C.A.A.F. 2022).

preceding section, this Court has more than sufficient evidence to reach that conclusion. Accordingly, it should find that the conviction is factually sufficient.

CONCLUSION

WHEREFORE, the United States respectfully requests this Court affirm the findings and sentence.

Respectfully submitted,

NOLAN.JOHN.PAUL. [redacted] Digitally signed by NOLAN.JOHN.PAUL. [redacted] Date: 2024.10.31 21:13:43 -04'00'

DATE: 31 October 2024

John Nolan
U.S. Coast Guard
Appellate Government Counsel
Commandant (CG-LMJ)
[redacted]

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was delivered to the Court and opposing counsel via e-mail on 31 October 2024.

NOLAN.JOHN.PAUL. [redacted] Digitally signed by NOLAN.JOHN.PAUL. [redacted] Date: 2024.10.31 21:14:30 -04'00'

John Nolan
U.S. Coast Guard
Appellate Government Counsel
Commandant (CG-LMJ)
[redacted]

IN THE UNITED STATES
COAST GUARD COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee* v. **Erick R. KELLEY**, Electronics Technician Second Class/E-5 U.S. Coast Guard, *Appellant*	07 NOVEMBER 2024 APPELLANT'S REPLY Docket No. 1495 Case No. CGCMG 0396 Before McClelland, Havranek, Brubaker Tried at Alameda, CA on 15-21 May 2023 before a General Court-Martial convened by Commander, U.S. Coast Guard Pacific Area

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TO THE HONORABLE JUDGES OF THE UNITED STATES
COAST GUARD COURT OF CRIMINAL APPEALS

Thad J. Pope
LCDR, USCG
Appellate Defense Counsel
[redacted]

COMES NOW, Petty Officer Second Class Erick R. Kelley, in Reply to the Government's Answer.

Reply

1. Government Concessions.

Appellant first wishes to highlight some of the key concessions the Government made in its Answer, which inform this Court's analysis and Appellant's Reply.

Among them, the Government conceded the eight images Appellant was charged with wrongfully possessing were specifically identified at the Article 32 hearing.[1] The specification, with the Government's prior identification of what eight images Appellant was wrongfully charged with possessing, then underwent Article 34 review, was referred to a general court-martial, and Appellant was arraigned on it with no modification.[2]

The Government further conceded the two images Appellant was convicted of wrongfully possessing were not included in the list of the eight charged images.[3] The Government never attempted, nor did the Military Judge require, the original specification to be

[1] Appellee's Answer at 4 ("The Government's original intent was to prove up the possession offense with the same eight images that were provided to the Article 32 officer; it would introduce additional images of child pornography, but only for limited use pursuant to Rule 404(b).").
[2] Appellee's Answer at 4 (discussion of Article 32 and referral processes generally), 18 (discussion of referral generally; "The specification was not changed."), 20 ("the charge remained in the same form as it was when it was referred."); Article 32 Report (SJA's Pretrial Advice under Article 34, UCMJ).
[3] Appellee's Answer at 4-5 ("The Government's original intent was to prove up the possession offense with the same eight images that were provided to the Article 32 officer; it would introduce additional images of child pornography, but only for limited use pursuant to Rule 404(b). However, during the course of pretrial motions, the Government switched gears…"), 13 ("In finding Appellant guilty of possession of child pornography, the members selected two images (Hebes.pdf and Image 720d) that had not been provided to the Article 32 officer."), 14-16.

amended to reflect additional images being added to the specification.[4] Additional images were merely added to the Findings Worksheet.[5] Appellant was acquitted of seven of the original eight charged images.[6]

2. Insufficient Legal Justification for Upholding Appellant's Conviction.

The Government attempted to justify affirming Appellant's convictions based on the evidentiary principle of *res gestae*, distinguishable precedents, and based on purported waivers by Trial Defense Counsel. However, the Government's arguments remain unpersuasive.

i. The Government and Military Judge Misunderstood and Misapplied Res Gestae.

The Government continues to misunderstand and misapply the concept of *res gestae* in its analysis of this and related assignments of error. The Air Force Court of Criminal Appeals discussed *res gestae* in *United States v. Robertson*:

> Facts and circumstances surrounding an offense are always admissible, whether or not they fall into the category of *uncharged misconduct* (emphasis added). This type of evidence often has been termed "res gestae." It includes conduct, or misconduct *not charged* (emphasis added), which is admissible because it is so closely intertwined *with the offense charged* as to be part and parcel of *that offense*.... Evidence of "res gestae" is always admissible both on the merits and during presentencing proceedings regardless of the plea, subject only to the balancing test prescribed by Mil. R. Evid. 403.
>
> *United States v. Keith*, 17 M.J. 1078, 1079–80 (A.F.C.M.R. 1984) (citation omitted); *see also United States v. Thomas*, 11 M.J. 388, 392–93 (C.M.A. 1981) (holding admission of uncharged *res gestae* acts "can be justified in terms of preventing a gap in the narrative of occurrences"). "*Res gestae* evidence is vitally important in many trials.... It enables the factfinder to see the full picture so that

[4] Appellee's Answer at 4-5, 18 ("The specification (as referred) reads exactly the same as the specification as it was submitted to the members for deliberations.").
[5] Appellee's Answer at 14-15 ("On the eve of trial, the Government notified the court and defense counsel of which images of child pornography it would highlight for the members on the Findings Worksheet.").
[6] Appellee's Answer at 1 ("He was found guilty 'except the word, eight, of the excepted word not guilty.' App. Ex. 105 at 1."), 20 ("other than the uncontroversial striking of the word 'eight' (to align with their selection of only two images)—the factfinder here made no exceptions and substitutions."). The 8th image was never listed on the Findings Worksheet.

> the evidence will not be confusing and prevents gaps in a narrative of occurrences which might induce unwarranted speculation ....” *United States v. Metz*, 34 M.J. 349, 351 (C.M.A. 1992) (citations omitted).[7]

To illustrate the Government's misunderstanding of *res gestae*, consider the Government's Footnote 92 in its Answer:

> *United States v. Treat*, 73 M.J. 331 (C.A.A.F. 2014) (prejudice inquiry on variance claim) (“Importantly, the defense has not identified for this Court any different trial strategy it might have employed . . . .”). Appellant posits that the particularly vile nature of the images in Hebes.pdf may have prompted defense counsel to adopt a different defense, perhaps sounding in claims of mental health issues. *See* Appellant's Br. at 56. However plausible that notion may be, it is not relevant in this context. *The record makes clear that, even if it was not on the Findings Worksheet, Hebes.pdf would have been introduced as res gestae evidence.* R. at 121 (Article 39(a) session of 20 Dec 2022). *The members would see it either way* (emphasis added).[8]

The rub is not whether the members would have *seen* the Hebes.pdf file or Image 720d. What matters is the purpose for which the members could *use* that evidence. Was it admissible for limited purposes under MRE 404(b) to prove the *charged* offenses? Was it admissible more broadly (arguably) as *res gestae* to prove the *charged* offenses? Or did it represent additional offenses that had neither been charged nor were part of a charge that was *de facto* amended without complying with RCM 603?

Res gestae is an evidentiary rule or theory of admissibility which permits evidence to be admitted and considered in proving the *charged offense*, but not to serve as additional offenses upon which the members may convict. There are numerous 19th century United States Supreme Court cases that discuss the principle of *res gestae*, many in civil cases, but all of which address the admissibility of evidence in consideration of

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[7] *United States v. Robertson*, No. ACM 39061 (REH), 2020 WL 4499879, at *6 (A.F. Ct. Crim. App. Aug. 3, 2020).
[8] Appellee's Answer at 21 (Footnote 92).

the identified charge or cause of action.[9] These reveal that *res gestae* is simply a theory of admissibility for potential evidence. However, this principle does not permit the government to add otherwise uncharged misconduct in a criminal case or allow parties to add additional causes of action in a civil case. Admitted evidence does not change the nature of the charge or cause of action.

The Government is incorrect in arguing that when admitted as *res gestae*, the evidence "would be available for *all* purposes . . . ."[10] A review of the Supreme Court cases[11] cited above shows that even when evidence is admitted as *res gestae*, that is not

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[9] *See, e.g.*, *Alexander v. United States*, 138 U.S. 353, 356 (1891) (referencing "the rule [for *res gestae*] laid down in [the infamous 18th Century English treason case against] Lord George Gordon"); *Beaver v. Taylor*, 68 U.S. 637, 642 (1863) ("It is, perhaps, not possible to lay down any general rule as to what is a part of the *res gestae* which will be decisive of the question in every case in which it may be presented by the ever-varying phases of human affairs"); *Norwich Transp. Co. v. Flint*, 80 U.S. 3, 6 (1871) ("In a suit by a passenger against a steamboat company for injuries done to him on the deck of a steamboat by the discharge of a gun by some disorderly soldiers … [t]he statements of the sergeant ['For God sake, come up; a man has been shot!'], were not offered in evidence for the purpose of proving the facts stated by him, but the whole incident (including those statements) was adduced in evidence for the purpose of showing the manner in which the officers attended to their duty whilst the disturbance was going on, the fact that notice of its progress was communicated, the time that it continued, and the degree of alarm it was calculated to excite in such a person as the sergeant appeared to be. These were substantially the purposes for which the evidence was professedly offered, and for these purposes, as part of the *res gestae*, it was clearly competent."); *New Jersey Steamboat Co. v. Brockett*, 121 U.S. 637, 648–49 (1887) (Statements such as "'You farmers are so stingy, you are too stingy to buy a state-room, and you ought to be killed" were considered "part of the *res gestae*" because "they had some relation to the inquiry whether the enforcement of [regulations prohibiting third class passengers in staterooms aboard the steamship] was attended with unnecessary or cruel severity" when defendant's employee pushed plaintiff, causing injury); *Vicksburg & M.R. Co. v. O'Brien*, 119 U.S. 99, 107 (1886); *Nudd v. Burrows*, 91 U.S. 426, 438 (1875) ("Where two or more persons are associated for the same illegal purpose, any act or declaration of one of the parties in reference to the common object, and forming a part of the *res gestae*, may be given in evidence"); *Barreda v. Silsbee*, 62 U.S. 146 (1858).

[10] Appellee's Answer at 5.

[11] The cited cases are just a sample of the 19th Century Supreme Court cases on point. There are similar cases from the early 20th Century that are not cited.

carte blanche to consider hearsay evidence for the truth of the matter asserted, or to consider the evidence as showing a criminal propensity. The principle of *res gestae* appears to have been a precursor to modern rules and exceptions regarding hearsay and propensity evidence. Thus, even *res gestae* evidence has built-in limitations. *Res gestae* is evidence of "the events *at issue*, or other events contemporaneous with them" (emphasis added).[12] But *res gestae* evidence cannot become new offenses.

Although the AFCCA in *Keith* "indicated that *res gestae* evidence is so manifestly relevant as to require no specific instructions to guide the court members' use of it,"[13] this concept caused the Military Judge here to erroneously permit its inclusion on the Findings Worksheet and be considered as separate offenses, instead of limiting its use.[14]

ii. Trial Defense Counsel did not waive Appellant's Due Process rights.

Trial defense counsel eventually withdrew his objection to the admission of the additional images (including the Hebes.pdf and Image 720d) into evidence under MRE 404(b) or as *res gestae.* But that does not mean that admitting evidence under the *res gestae* theory permits a *de facto* amendment to the charge without having to comply with RCM 603. Trial defense counsel's withdrawal of his MRE 404(b) objection was not a blanket waiver of Appellant's due process rights, or his rights under RCM 603.

Nothing in the record shows Appellant's or his counsel's intentional relinquishment or abandonment of his right to proper charging, preferral, arraignment, referral, or compliance with Article 32 or 34 on these additional offenses. This was not a

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[12] *United States v. St. Jean*, 83 M.J. 109, 112 (C.A.A.F. 2023).
[13] *Robertson*, 2020 WL 4499879, at *8 (citing *United States v. Keith*, 17 M.J. 1078, 1079–80 (A.F.C.M.R. 1984)).
[14] See Appellant's Assignments of Error and Brief at 54 (Footnote 206).

guilty plea. This was a contested case involving serious allegations and significant potential punishments. It is illogical that Appellant would have waived all these safeguards, because he did not stand to benefit in any way from such a broad waiver. In addition, because the Military Judge did not require the Government to amend the specification, Appellant was denied an additional formal opportunity to object under RCM 603. How does one waive an opportunity denied?

The record does show Trial Defense Counsel continuing to raise issues regarding the additional images, and the Military Judge's subsequent failure to understand and correctly address the purposes for which it would be admitted.[15] Pages 42 through 44 of Appellant's Assignments of Error and Brief recite the relevant timeline of events. Those communications show that Trial Defense Counsel continued to raise his concerns regarding the purposes for which this evidence would be admitted, but the Military Judge erroneously believed that Trial Defense Counsel had waived this issue.

Trial Defense Counsel withdrew his objection to the additional images being "eligible to prove the *elements of the charged offenses*" (emphasis added),[16] as he believed it was offered as *res gestae*. He clearly "didn't take the court's instruction as an opportunity to substitute 404b evidence [or *res gestae* evidence] in for those eight noticed/charged images."[17] Trial Defense Counsel made his objections, was overruled (preserving the issue), and continued to flag the exact issue Appellant now asserts. Trial Defense Counsel was not obligated to continue objecting after the Military Judge made

[15] App. Ex. XIX (Ruling on Def. Motion to Exclude MRE 404(b) of 11Oct22); R. at 1 (Art. 39(a) of 20Dec22 – MRE 404(b) motions hearing); App. Ex. 47 (Military Judge's email re: Findings Worksheet); App. Ex. 48 (Defense's email response to Military Judge's email).
[16] App. Ex. 48 at 1 (MJ's email of 14 May 22, responding to CDC's earlier reply in App. Ex. 48).
[17] App. Ex. 48 at 2 (CDC's email of 14 May 22, replying to MJ email at App. Ex. 47).

his rulings and decisions clear.[18] Alternatively, his failure to continue objecting was ineffective.

iii. The authorities the Government relies on are distinguishable.

The Government argued, "the language of the specification did not limit the Government's choice in which images to rely on."[19] In support of this, the Government cited to *United States v. English*, 79 MJ 116 (2019). However, *English* actually supports Appellant's position. In *English*, the CAAF stated,

> While a violation of Article 120, UCMJ, based on the theory of criminality charged by the Government requires "unlawful force," Article 120(a)(1), UCMJ, the Government was not required to draft the specification alleging a particular type of force, i.e., that Appellant committed this particular offense by "grabbing her head with his hands." *Cf. United States v. Fosler*, 70 M.J. 225, 229 (C.A.A.F. 2011) (observing that "[t]he military is a notice pleading jurisdiction"). *But when it narrowed the scope of the charged offense by alleging the particular type of force, it was required to prove the facts as alleged*.[20]

The identity of the charged images was not originally specified in the charge. But once the Government specified which eight images constituted this offense at the Article 32 hearing, it narrowed the scope of the charged offense to those eight images, which was a pre-referral *de facto* amendment to the charge sheet. As in *English*, the Government was then required to prove the facts as alleged. It was error for the Military Judge to allow the Government to *de facto* amend the charged specification again. This time, the Government sought to make this change

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[18] *United States v. Killion*, 75 M.J. 209, 214 (C.A.A.F. 2016) ("While there are no 'magic words' dictating when a party has sufficiently raised an error to preserve it for appeal, *see United States v. Smith,* 50 M.J. 451, 456 (C.A.A.F.1999), of critical importance is the specificity with which counsel makes the basis for his position known to the military judge. *See United States v. Payne,* 73 M.J. 19, 23 (C.A.A.F.2014) (emphasizing the need for objections to be specific); *Cross v. Cleaver,* 142 F.3d 1059, 1068 (8th Cir.1998); *Lang v. Texas & P. Ry. Co.,* 624 F.2d 1275, 1279 (5th Cir.1980) (noting that the purpose of objecting is to provide an opportunity for errors to be corrected at trial)").

[19] Appellee's Answer at 14.

[20] *United States v. English*, 79 MJ 116, 120 (2019).

post-arraignment and post-referral, via the Findings Worksheet, to add more images to those that had been previously charged.

Once the Government identified what particular eight images Appellant was charged with wrongfully possessing at the Article 32 hearing, and then referred and arraigned Appellant on that specification without modification or amendment, they were bound to those particular images.[21] The Government could have withdrawn the charge, amended it, and re-preferred it, but chose not to do so. The Government attempts to get around this fact by discussing waiver, but again, its authorities and analysis fall short.

In support of waiver, the Government cites to *United States v. Campos*.[22] This case is distinguishable because it involved a guilty plea and a pre-trial agreement in which appellant agreed to stipulate to expected expert testimony which was later admitted at sentencing. The Government also cites to *United States v. Gladue,*[23] another distinguishable guilty plea case with a pre-trial agreement. *Gladue* explored and delineated the scope of a boilerplate "waive all waiveable motions" clause in the pre-trial agreement, which is inapplicable here. The Government's use of *United States v. Piolunek*[24] is distinguishable because it involved a general verdict issue, unlike Appellant's case. *United States v. Jenkins,*[25] an 11th Circuit case which involved the production and distribution of child pornography, not possession. Further, the images in *Jenkins* were limited to a specific known victim.

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[21] *United States v. Nedeau*, 23 C.M.R. 182 (C.M.A. 1957) (dismissing charges against the accused when the accused was found not guilty of stealing the items specified in the charge sheet but guilty of stealing other items).
[22] *United States v. Campos*, 67 M.J. 330 (C.A.A.F. 2009).
[23] *United States v. Gladue*, 67 M.J. 311 (C.A.A.F. 2009).
[24] *United States v. Piolunek*, 74 M.J. 107 (C.A.A.F. 2015).
[25] *United States v. Jenkins*, No. 20-13831, 2022 WL 474704 (11th Cir. Feb. 16, 2022).

The Government also cited to *United States v. Mumma,*[26] a pending federal district court case, but cited a Judge's order in that case following a motion in limine regarding the admissibility of evidence based on grand jury proceedings. Apart from the obvious distinguishing factors, the Judge in *Mumma* denied that motion in part because the government was not required to charge each specific image.[27] But as noted above, once the Government here "narrowed the scope of the charged offense by alleging" the eight specific images identified at the Article 32 hearing, "it was required to prove the facts as alleged."[28]

All of these cases are distinguishable from Appellant's contested case and are an insufficient justification to affirm Appellant's conviction for wrongful possession of two uncharged images, which followed his acquittal.

iv. *The Government's other arguments remain unpersuasive*.

The Government argues "[h]ere, however, the potential problem was cured by open dialogue prior to trial."[29] The Government fails to cite any precedent or rule for the notion that "open dialogue" can solve the host of due process, UCMJ, RCM, and jurisdictional issues identified by Appellant. In particular, no amount of dialogue could resolve the jurisdictional issue the Government created when it convicted Appellant of possessing images that were never charged. "The law is well settled that '… the [referral] order is a jurisdictional prerequisite.'"[30] "Jurisdictional error occurs when a court-martial is not constituted in accordance with the UCMJ

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[26] *United States v. Mumma*, No. 120CR00168JLTSKO, 2024 WL 967725, at *6 (E.D. Cal. Mar. 6, 2024).
[27] Id at *6.
[28] *English*, 79 MJ at 120.
[29] Appellee's Answer at 16 (see Footnote 73).
[30] *United States v. Ballan*, 71 M.J. 28, 32 (C.A.A.F. 2012) (citing *United States v. Wilkins*, 29 M.J. 421, 424 (C.M.A. 1990)); *see also United States v. Parker*, 59 MJ 195 (C.A.A.F. 2004); *United States v. Simmons*, 82 M.J. 134 (C.A.A.F. 2022).

(citation omitted). Jurisdiction depends upon a properly convened court, composed of qualified members chosen by a proper convening authority, *and with charges properly referred*" (emphasis added).[31]

The Government further argues that as long as Appellant is convicted of possessing child pornography, "the use of these additional images was fair game" because of the "fungibility of the images themselves."[32] The Government is basically saying that although Appellant was charged with possessing eight specific images, he can be convicted on that charge, without amendment, of possessing any additional images of child pornography, as long as they come from among the thousands of images found during the course of an investigation. This would appear to be exactly what MRE 404(b) prohibits and would be contrary to fundamental concepts of due process enshrined in the Constitution and UCMJ.

v. The members said they "voted on both specs," not that they took a straw poll.

Appellant was acquitted before any ambiguity caused by subsequent voting arose. On the note the members passed to the military judge, they indicated they "voted on both specs, but [they didn't] have ¾ majority on any individual files."[33] They came to page three of the Findings Worksheet after voting, then decided they "weren't clear on how to come to consensus on each file (page 3 of 3) or if that's required."[34]

Just because the members were confused about how to fill out page 3 of the Findings Worksheet does not mean that they had not voted. Indeed, they told the Court that they had voted and did not reach a ¾ majority on any individual files. To the extent that they: (1) were

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[31] *United States v. Adams*, 66 M.J. 255 (C.A.A.F. 2008). *See also*, *United States v. Oliver*, 57 M.J. 170 (C.A.A.F. 2002).
[32] Appellee's Answer at 17.
[33] App. Ex. 107.
[34] *Id*.

instructed they had to reach a ¾ majority to convict; (2) were further instructed that because there was 7 of them that meant they needed 6 guilty votes; and (3) stated they were unable to reach a ¾ majority on any image, should certainly lead to the conclusion that they had voted on each image and their vote resulted in an acquittal.

The Government bases their contra-argument on the assumption that the members had not taken a formal vote before they wrote the note to the Military Judge. This is despite the panel stating on the note that they "had voted on both specs." To the contrary, the Government posits that the members had taken a straw poll and had not completed an actual formal vote. But the members did not say that they took a straw poll in their note. The members said that they voted. The concept of this vote being a straw poll was never discussed at trial and should be afforded no weight now.

As argued in Appellant's brief, based on this note from the panel, the Military Judge should have recognized that the panel's vote had resulted in a full-acquittal and that they needed assistance in filling out the worksheet. In addressing this issue, the Military Judge could have easily and permissibly clarified,[35] as listed above, that when the panel said they had not reached a '¾ majority on any image" that meant they had not reached a ¾ majority to convict and had therefore acquitted Appellant. He could have then instructed the panel how to fill out the worksheet accordingly.

[35] Military Rule of Evidence 606(b)(2)(C), Manual for Courts-Martial (2024 ed.). *See also*, *United States v. Brooks*, 42 M.J. 484, 487 (C.A.A.F. 1995); *United States v. Daniels*, No. ACM 38371, 2014 WL 5511137 (A.F. Ct. Crim. App. 14 Oct. 2014). Note that M.R.E. 606(b) was amended after *Brooks* and *Daniels* to permit the inquiry that was required here.

Instead, the Military Judge erred by ignoring this vote and sent the panel back into deliberations, basically to re-vote and reconsider their decision without instructing the members on reconsideration procedures.

Conclusion

The Government chose to charge Appellant with the wrongful possession of eight images of child pornography. They specified what particular eight images comprised that charge during the Article 32 hearing. The SJA based his Article 34 advice on those eight images being the charged misconduct. The Convening Authority referred that specification featuring those specific eight images to a General Court-Martial. The Appellant was arraigned on those eight images.

After arraignment and as the case progressed towards trial, Government prosecutors decided they wanted to use other images to prove their case. They initially identified MRE 404(b) as a method to use uncharged misconduct permissibly, basically to show Appellant's possession of the eight charged images was not an accident or mistake.

But then, as described by Appellate Government counsel, the prosecutors "switched gears."[36] They did not want to use the possession of these extra images for a limited MRE 404(b) purpose, they wanted to charge and convict Appellant of a crime for possession of these additional images. Faced with the established procedural hurdles of having to add these images to charges pending against Appellant, the Government invented a novel short-cut, got the Military Judge to buy off on it and instantly added offenses while ignoring Appellant's due process rights.

The military justice system has numerous checks and balances in place to ensure appellants receive due process. Those safeguards have failed in Appellant's case. It is incumbent

[36] Appellant's Answer at 4.

on this Court to right the ship and ensure Appellant is not convicted of crimes for which he was never charged, and after the members acquitted him. This Court should set aside Appellant's convictions with prejudice.

DATE: 07 November 2024

Respectfully submitted,

POPE.THADEUS.JACKSON.[redacted] Digitally signed by POPE.THADEUS.JACKSON[redacted] Date: 2024.11.07 13:57:00 -05'00'

Thad Pope
LCDR, USCG
Appellate Defense Counsel
[redacted]

Certificate of Filing and Service

I certify that the foregoing was filed electronically with this Court and that a copy was delivered to opposing counsel via email on 07 November 2024.

POPE.THADEUS.JACKSON.[redacted] Digitally signed by POPE.THADEUS.JACKSON[redacted] Date: 2024.11.07 13:57:31 -05'00'

Thad Pope
LCDR, USCG
Appellate Defense Counsel
[redacted]

IN THE UNITED STATES
COAST GUARD COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee* v. **Erick R. KELLEY**, Electronics Technician Second Class/E-5 U.S. Coast Guard, *Appellant*	07 NOVEMBER 2024 MOTION FOR ORAL ARGUMENT Docket No. 1495 Case No. CGCMG 0396 Before McClelland, Havranek, Brubaker Tried at Alameda, CA on 15-21 May 2023 before a General Court-Martial convened by Commander, U.S. Coast Guard Pacific Area

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TO THE HONORABLE JUDGES OF THE UNITED STATES
COAST GUARD COURT OF CRIMINAL APPEALS

Pursuant to Rule 25 of this Court's Rules of Appellate Procedure, Appellant respectfully requests oral argument on the following two assignments of error:

I. WHETHER THE PANEL FULLY ACQUITTED APPELLANT WHEN IT INITIALLY VOTED ON THE CHARGE AND SPECIFICATIONS?

II. WHETHER THE MEMBERS' FINDINGS AS TO SPECIFICATION ONE OF THE CHARGE CONSTITUTED A FATAL VARIANCE?

DATE: 07 November 2024

Respectfully submitted,

POPE.THADEUS.JACKSON. [redacted] Digitally signed by POPE.THADEUS.JACKSON. [redacted] Date: 2024.11.07 15:51:24 -05'00'

Thad Pope
LCDR, USCG
Appellate Defense Counsel
[redacted]

Certificate of Filing and Service

I certify that the foregoing was filed electronically with this Court and that a copy was delivered to opposing counsel via email on 07 November 2024.

POPE.THADEUS.J[redacted]
ACKSON.[redacted]
Digitally signed by POPE.THADEUS.JACKSON[redacted]
Date: 2024.11.07 15:51:58 -05'00'

Thad Pope
LCDR, USCG
Appellate Defense Counsel
[redacted]

IN THE UNITED STATES
COAST GUARD COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee* v. **Erick R. KELLEY,** **Electronics Technician** **Second Class/E-5** U.S. Coast Guard, *Appellant*	14 January 2025 MOTION FOR JUDGE HAVRANEK TO RECUSE, AND, IN THE ALTERNATIVE, FOR VOIR DIRE OF JUDGE HAVRANEK, CHIEF JUDGE MCCLELLAND, AND JUDGE BRUBAKER THROUGH WRITTEN INTERROGATORIES Docket No. 1495 Case No. CGCMG 0396 Before McClelland, Havranek, and Brubaker Tried at Norfolk, VA by a Special Court-Martial convened by Commander, U.S. Coast Guard Ninth District, on 2 November 2022.

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES
COAST GUARD COURT OF CRIMINAL APPEALS

Pursuant to Rule 23 of this Court's Rules of Practice and Procedure, Appellant, by and through undersigned counsel, respectfully moves for Judge Havranek to recuse himself from Appellant's case. In the alternative, Appellant moves for *voir dire* through written interrogatories of Judge Havranek, Chief Judge McClelland, and Judge Brubaker.

Judge Havranek currently serves as a collateral-duty civilian appellate judge on this Court. This motion is predicated on Judge Havranek's full-time civilian employment as the Principal Deputy General Counsel for the Department of Homeland Security (DHS). Judge Havranek's primary duties at DHS cause his impartiality to reasonably be questioned under 28 U.S.C. § 455(a), which provides, "[a]ny justice, judge, or magistrate judge of the United States

shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." Simply put, Judge Havranek's DHS position "is incompatible with duty as an appellate judge" (Military Justice Manual, COMDTINST M5810.1H, para. 26.G.5.c) for the reasons discussed below.

When Judge Havranek was first assigned to this Court in 2011, his position at DHS was as an Associate General Counsel for the Operations and Enforcement Law Division (Appendix A), a position which ostensibly did not conflict with his collateral duties as an appellate judge. Judge Havranek is now the Principal Deputy General Counsel for DHS, the number two attorney within the Department (Appendix B).[1] As Appendix B shows, Judge Havranek's duties now include advising the Secretary to direct the Commandant to take certain policy actions regarding sexual assault and sexual harassment response in the Coast Guard.

As Principal Deputy General Counsel, Judge Havranek has certain delegations of authority granted to him by the General Counsel of DHS, the chief legal officer of the Department (Appendix C). Generally, these delegations are incompatible with his duties as an appellate judge because they effectively place Judge Havranek in a position superior to the Coast Guard Judge Advocate General (TJAG), the officer who assigned Judge Havranek to this Court, and to the other members of the Court.

Specifically, in paragraph I of Appendix C, the DHS General Counsel vests general "authority in the Principal Deputy General Counsel to perform the duties and functions of the General Counsel on behalf of the General Counsel." In paragraph II.D. of this document, the

[1] This document was provided as an attachment to an email on 12 July 2024 from the Deputy Director, Executive Secretariat for the Office of the Commandant of the Coast Guard to an email distribution group of members of the Office of the Judge Advocate General at the direction of the Special Assistant to the Commandant.

General Counsel vests specific authority in the Principal Deputy General Counsel to "[c]oordinate matters and resolve issues among the Associate General Counsels, Component Chief Counsels, Legal Advisors, and the Judge Advocate General of the Coast Guard." In paragraphs II.H. and I of this document, the Principal Deputy General Counsel is delegated the authority to act in the capacity of the General Counsel when the General Counsel is absent, dies, resigns or is incapacitated.

This delegation makes the Principal Deputy General Counsel the responsible DHS attorney for resolving issues that specifically involve TJAG. A reasonable person, having knowledge of all the facts, would conclude that this unorthodox arrangement of a judge occupying a position of responsibility higher than the position of the individual that assigned the judge to the bench would reasonably raise a question about the judge's impartiality. Implicit in the concept of assignment is that the assignor is senior to the assignee.[2]

TJAG retains the authority to terminate his assignments to the bench for all appellate judges. (Military Justice Manual, COMDTINST M5810.1HJ, para. 26.G). But whether he feels free to execute that authority with respect to Judge Havranek is reasonably questioned by the fact that the Principal Deputy General Counsel is superior to TJAG and all attorneys in the Department, except the General Counsel.

[2] As quoted above, the Military Justice Manual (Commandant Instruction Manual 5810.1H, para. 26.G.5) gives TJAG the power to determine whether a collateral duty appellate judge is unable to serve as such when that judge is reassigned to another billet and TJAG determines the new billet is incompatible with duty as an appellate judge. This provision is not expressly limited to military personnel, and it stands to reason that TJAG also ought to be able to determine whether a civilian employee on the Court reassigned to another employment position in either the Coast Guard or DHS at large is able to perform the duty of appellate judge.

An additional ground that calls for Judge Havranek's recusal is based on the general court-martial convening power of the Secretary of Homeland Security. Under 10 U.S.C. § 822(a)(4), the "Secretary concerned" is a general court-martial convening authority (GCMCA). The term "Secretary concerned" means, among others, the Secretary of Homeland Security, with respect to matters concerning the Coast Guard when it is not operating as a service in the Department of the Navy. 10 U.S.C. § 101(a)(9)(D). Because the Secretary is a GCMCA, the General Counsel is the functional equivalent of a staff judge advocate when advising on military justice matters. Given Judge Havranek's delegated duties and subject-matter expertise in military justice, Judge Havranek likely fills the role of the staff judge advocate when it comes to advising the General Counsel and Secretary on matters involving military justice.

Historically, the Coast Guard Organizational Manual[3] prohibited the assignment of staff judge advocates (SJA) to this Court as collateral duty judges due to the level of control courts-martial convening authorities had over their SJAs. *See United States v. Carpenter*, 37 M.J. 291, 296 (C.M.A. 1993), *vacated* 515 U.S. 1138 (1995); *see also*, *Ryder v. United States*, 515 U.S. 177 (1995). While the policy identified in *Carpenter* is no longer published, the principle is still valid. The level of control the Secretary has over the General Counsel and Principal Deputy General Counsel is similar to that which other GCMCAs have over their SJAs.

Appellant's motion is ripe because Judge Havranek is assigned to the panel which is hearing his case. However, these concerns would apply to any case to which Judge Havranek is assigned so long as he continues to serve as the Principal Deputy General Counsel. If Judge Havranek does not recuse himself, Counsel moves in the alternative to *voir dire* Judge Havranek, Chief Judge McClelland, and Judge Brubaker through the following written interrogatories:

[3] This manual is no longer valid or published, but CG-6 may retain an historical copy.

Interrogatories for Judge Havranek (all questions pertain to the time after he assumed duties as the DHS Principal Deputy General Counsel):

(1) List the date you assumed the duties of Principal Deputy General Counsel, DHS, and whether you currently serve in that capacity;

(2) List the names of any matters before this Court that you participated in while serving as Principal Deputy General Counsel, DHS;

(3) List and detail the scope of your duties as Principal Deputy General Counsel regarding the Coast Guard;

(4) List and detail your involvement and interactions with TJAG, the Coast Guard Deputy Judge Advocate General, the Office of Military Justice within the Office of the Judge Advocate General, the Office of the Chief Prosecutor, and Staff Judge Advocates in the field. List and detail any anticipated involvement or interactions with these offices in your capacity as Principal Deputy General Counsel;

(5) List and detail your involvement with Coast Guard military justice matters, programs, and policies;

(6) List and detail your involvement with Coast Guard military justice cases;

(7) List and detail your involvement with preparing responses to Congressional inquiries into Coast Guard military justice investigations and cases, to include but not limited to Operation Fouled Anchor;

(8) List and detail your involvement with preparing the DHS Secretary or other DHS personnel, as well as the Commandant, Admiral Fagan, or other Coast Guard personnel for testifying regarding military justice matters before Congress and/or speaking to other official bodies;

(9) List and detail your involvement with Coast Guard sexual assault prevention programs, training, and related reports provided to DHS and/or Congress;

(10) List and detail your involvement with Coast Guard sexual harassment prevention programs and related reports provided to DHS and/or Congress;

(11) List and detail your involvement with the nominating process for CGCCA appellate judges to date and possible future involvement with this process;[4]

(12) List and detail your involvement, or anticipated involvement, with the preparation, approval, disapproval, review or submission of any other member of the CGCCA's performance evaluation;

(13) List and detail your involvement, or anticipated involvement, with the preparation, approval, disapproval, review or submission of any Coast Guard civilian attorney or judge advocate's performance evaluation;

(14) List and detail your involvement, or anticipated involvement, with the allocation or assignment of civilian and military attorneys within the Coast Guard; and

(15) List and detail your involvement, or anticipated involvement, with Chief Judge McClelland and Judge Brubaker in any professional capacity not related to CGCCA duties.

[INTENTIONALLY LEFT BLANK]

[4] Pursuant to the nomination and recommendation that accompanied Judge Havranek's selection to the CGCCA, Mr. Joseph Maher, then DHS Deputy General Counsel, "reviewed the action" (Appendix A). To the extent that Judge Havranek now occupies that position, it appears he would now be involved in the nomination, recommendation, and selection of appellate judges that are appointed by the DHS Secretary.

Interrogatories for Chief Judge McClelland and Judge Brubaker (all questions pertain to time while serving as a member of this Court):

(1) List and detail interactions, and anticipated interactions, in any professional capacity, with DHS OGC personnel, to include the Principal Deputy General Counsel of DHS, past or present (Judge Havranek or his predecessors);

(2) List and detail interactions, and anticipated interactions, with DHS OGC personnel, to include the Principal Deputy General Counsel, regarding the nomination, appointment, and assignment of CGCCA appellate judges;

(3) List and detail any role DHS OGC personnel, to include the Principal Deputy General Counsel, have had with the preparation, approval, disapproval, review or submission of your performance evaluation as a civilian judge on the CGCCA;

(4) List and detail to the best of your knowledge any role DHS OGC personnel, to include the Principal Deputy General Counsel, have had with the preparation, approval, disapproval, review or submission of the performance evaluation of any member of your performance rating chain;

(5) Not including CGCCA duties, list and detail any professional matters you have participated in that have been subject to DHS oversight, tasking, or involvement while serving as a member of this Court.

[INTENTIONALLY LEFT BLANK]

WHEREFORE, Appellant respectfully requests this motion for recusal be granted or, in the alternative, *voir dire* through these written interrogatories.

Respectfully submitted,

POPE.THADEUS.JACKSON [redacted] Digitally signed by POPE.THADEUS.JACKSON [redacted] Date: 2025.01.14 15:16:13 -05'00'

Thadeus Pope
LCDR, USCG
Appellate Defense Counsel
1254 Charles Morris St, SE
Bldg 58, Suite 100
Washington Navy Yard, D.C. 20374
[redacted]

Appendices

Appendix A: TJAG (RADM Kenney) memo 5817 of 31 March 2011, subj: Appellate Military Judge Appointments (with enclosures)

Appendix B: Principal Deputy General Counsel (Mr. Havranek) memo of 10 July 2024, subj: Evaluation of Sexual Assault and Sexual Harassment in the Coast Guard (with enclosures)

Appendix C: Department of Homeland Security Delegation No. 00423 (Rev. 00), issued 03 August 2024, subj: Delegation to the Principal Deputy General Counsel

Certificate of Filing and Service

I certify that a copy of the foregoing was delivered to the Court and opposing counsel via email on 14 January 2025.

POPE.THADEUS.JACKSON [redacted] Digitally signed by POPE.THADEUS.JACKSON [redacted] Date: 2025.01.14 15:16:39 -05'00'

Thadeus Pope
LCDR, USCG
Appellate Defense Counsel
1254 Charles Morris St, SE
Bldg 58, Suite 100
Washington Navy Yard, D.C. 20374
[redacted]

IN THE UNITED STATES COAST GUARD
COURT OF CRIMINAL APPEALS

UNITED STATES,
Appellee

v.

Erick R. KELLEY
Electronics Technician
Second Class (E-5)
U.S. Coast Guard,
Appellant

06 February 2025

APPELLANT'S MOTION FOR JUDGE HAVRANEK TO RECUSE, AND IN THE ALTERNATIVE FOR VOIR DIRE OF JUDGE HAVRANEK, CHIEF JUDGE MCCLELLAND, AND JUDGE BRUBAKER THROUGH WRITTEN INTERROGATORIES, FILED 14 JANUARY 2025

CGCMG 0396

DOCKET NO. 1495

ORDER

The Court referred Appellant's recusal motion to Judge Havranek for disposition. Without reaching the merits of the recusal motion, and for reasons unrelated to it, he has requested reassignment of this case only. This is due to his present workload, which is exceptionally high during a period of Presidential transition and high personnel turnover. A new panel will be assigned to replace Judge Havranek for this case.

Accordingly, it is, by the Court, this 6th day of February, 2025,

ORDERED:

That Appellant's motion is denied as moot.

For the Court,
VALDES.SARAH.P[redacted] Digitally signed by VALDES.SARAH.P[redacted] Date: 2025.02.06 12:48:36 -05'00'
Sarah P. Valdes
Clerk of the Court

Copy: Judge Advocate General's Representative
Appellate Government Counsel
Appellate Defense Counsel

IN THE UNITED STATES COAST GUARD
COURT OF CRIMINAL APPEALS

UNITED STATES, Appellee v. Erick R. KELLEY Electronics Technician Second Class (E-5) U.S. Coast Guard, Appellant	10 February 2025 APPELLANT'S MOTION FOR ORAL ARGUMENT, FILED 07 NOVEMBER 2025 CGCMG 0396 DOCKET NO. 1495 ORDER

On consideration of Appellant's Motion for Oral Argument, it is, by the Court, this 10th of February 2025,

ORDERED:

That Appellant's Motion for Oral Argument is hereby granted as to the following issues.

Appellant was acquitted but a finding of guilty was announced.

The members' findings constituted a fatal variance of Specification 1.

The Court will hear argument on **26 March 2025 at 1000** hours. The Oral Argument will take place at the Court of Criminal Appeals Courtroom, [redacted]

For the Court,
VALDES.SARAH.P[redacted]
Digitally signed by VALDES.SARAH.P[redacted]
Date: 2025.02.10 15:18:52 -05'00'
Sarah P. Valdes
Clerk of the Court

Copy: Judge Advocate General's Representative
Appellate Government Counsel
Appellate Defense Counsel

IN THE UNITED STATES COAST GUARD
COURT OF CRIMINAL APPEALS

UNITED STATES, Appellee v. Erick R. KELLEY Electronics Technician Second Class (E-5) U.S. Coast Guard, Appellant	12 March 2025 APPELLANT'S MOTION FOR ORAL ARGUMENT, FILED 07 NOVEMBER 2025 (TIME CHANGE) CGCMG 0396 DOCKET NO. 1495 ORDER

On consideration of Appellant's Motion for Oral Argument, it is, by the Court, this 12th of March 2025,

ORDERED:

That Appellant's Motion for Oral Argument is hereby granted as to the following issues.

Appellant was acquitted but a finding of guilty was announced.

The members' findings constituted a fatal variance of Specification 1.

The Court will hear argument on **26 March 2025 at 1100** hours. The Oral Argument will take place at the Court of Criminal Appeals Courtroom, [redacted]

For the Court,
VALDES.SARAH.P.[redacted]
Digitally signed by VALDES.SARAH.P.[redacted]
Date: 2025.03.12 09:08:32 -04'00'
Sarah P. Valdes
Clerk of the Court

Copy: Judge Advocate General's Representative
Appellate Government Counsel
Appellate Defense Counsel

APPELLATE BRIEFS

IN THE UNITED STATES
COAST GUARD COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee* v. **Erick R. KELLEY**, Electronics Technician Second Class/E-5 U.S. Coast Guard, *Appellant*	23 July 2024 CONSENT MOTION FOR LEAVE TO FILE CORRECTED BRIEF Docket No. 1495 Case No. CGCMG 0396 Before McClelland, Havranek, Brubaker Tried at Alameda, CA on 15-21 May 2023 before a General Court-Martial convened by Commander, U.S. Coast Guard Pacific Area

TO THE JUDGES OF THE UNITED STATES
COAST GUARD COURT OF CRIMINAL APPEALS

Pursuant to Rule 23 of this Court's Rules of Appellate Procedure, Petty Officer Second Class Erick R. Kelley ("Appellant"), through counsel, respectfully moves this Court for leave to file a corrected brief. Through undersigned counsel, Appellant timely filed his brief on 03 July 2024.

It has come to the attention of counsel that some corrections should be made to the brief to assist this Court in its review. These changes are editorial in nature; counsel has not added any supplemental authorities, but has removed extraneous language and corrected some typographical errors. If desired by the Court in consideration of this motion, counsel can provide a red-lined (track changes) version showing the changes made. Appellant's Assignments of Error brief (Corrected) is dated 23 July 2024 and is included as Appendix A to this motion. Counsel has coordinated with the Government and they consent to this motion.

WHEREFORE, Appellant respectfully requests that this Court grant this motion.

DATE: 23 July 2024

POPE.THADEUS.JAC[redacted]
KSON[redacted]
Digitally signed by POPE.THADEUS.JACKSON.[redacted]
Date: 2024.07.23 16:09:29 -04'00'

Thad J. Pope
LCDR, USCG
Appellate Defense Counsel
1254 Charles Morris St, SE
Bldg. 58, Suite 100
Washington Navy Yard, D.C. 20374
[redacted]

Certificate of Filing and Service

I certify the foregoing was filed electronically with this Court and that a copy was delivered to opposing counsel via email on 23 July 2024.

POPE.THADEUS.JAC[redacted]
KSON.[redacted]
Digitally signed by POPE.THADEUS.JACKSON[redacted]
Date: 2024.07.23 16:09:46 -04'00'

Thad J. Pope
LCDR, USCG
Appellate Defense Counsel
1254 Charles Morris St, SE
Bldg. 58, Suite 100
Washington Navy Yard, D.C. 20374
[redacted]

IN THE UNITED STATES COAST GUARD
COURT OF CRIMINAL APPEALS

UNITED STATES, Appellee v. Erick R. KELLEY Electronics Technician Second Class (E-5) U.S. Coast Guard, Appellant	24 July 2024 APPELLANT'S CONSENT MOTION FOR LEAVE TO FILE CORRECTED BRIEF, FILED 23 JULY 2024 CGCMG 0396 DOCKET NO. 1495 ORDER

On consideration of Appellant's Consent Motion for Leave to File Corrected Brief, it is, by the Court, this 24th day of July, 2024,

ORDERED:

That Appellant's Motion is hereby granted.

For the Court,
VALDES.SARAH.P.[redacted]
Digitally signed by VALDES.SARAH.P[redacted]
Date: 2024.07.24 08:55:09 -04'00'
Sarah P. Valdes
Clerk of the Court

Copy: Judge Advocate General's Representative
Appellate Government Counsel
Appellate Defense Counsel

THERE ARE NO APPELLATE BRIEFS

AT THIS TIME

REMAND

THERE WERE NO REMANDS

NOTICE OF COMPLETION OF APPELLATE REVIEW